Supreme Court, U.S.
FILED

06-993 JAN 16 2007

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ARI ZAVARAS, DIRECTOR,
COLORADO DEPARTMENT OF CORRECTIONS, *et al.*

Petitioners,

v.

DAVID P. STEVENS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN W. SUTHERS
Attorney General
of Colorado

DANIEL D. DOMENICO
Solicitor General

Catherine P. Adkisson,*
Assistant Solicitor
General
**Counsel of Record*
Laurie A. Booras
First Assistant Attorney
General
1525 Sherman Street
Denver, Colorado 80203
(303) 866-3052

January 16, 2007

QUESTION PRESENTED

Whether, on habeas corpus review, a federal court's disagreement with some, but not all, of the factors considered by a state court as part of a multi-factor balancing test renders the state court analysis "contrary to or an unreasonable application of clearly established Federal law" under 28 U.S.C. § 2254(d)(1) and therefore unworthy of any deference under that statute.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

INTRODUCTION 1

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT 4

REASONS FOR GRANTING THE PETITION 6

I. The Court should clarify whether a federal court owes deference to a state court's application of a multi-factor balancing test or may grant relief under AEDPA based solely on its decision that the state court's interpretation or application of the test was incorrect. 7

II. The Tenth Circuit's Rule Would Impact a Wide Range of Cases. 16

CONCLUSION 18

TABLE OF AUTHORITIES

PAGE

CASES

Brown v. Uphoff, 381 F.3d 1219 (10th Cir. 2004) 10

Cotto v. Herbert, 331 F.3d 217 (2nd Cir. 2003) 12

Crawford v Washington, 541 U.S. 36 (2004) 10, 16

Dorchy v. Jones, 398 F.3d 783 (6th Cir. 2005) 13

Green v. French, 143 F.3d 865 (4th Cir. 1998) 8

Hardaway v. Young, 302 F.3d 757 (7th Cir. 2002) 12, 17

Hart v. Attorney General, 323 F.3d 884 (11th Cir. 2003) 17

Lilly v. Virgina, 527 U.S. 116 (1999) 1, 6, 10, 14

Lockyer v. Andrade, 538 U.S. 63 (2003) 9, 10

People v. Stevens, No. 96CA1685 (Colo. App. November 19, 1998) 5

Rashad v. Walsh, 300 F.3d 27 (1st Cir. 2002) 17

Roberts v. Ohio, 448 U.S. 56 (1980) 1, 9, 11, 14

Stevens v. Colorado, 535 U.S. 975 (2002) 6

Stevens v. People, 29 P.3d 305 (Colo. 2001) 5

TABLE OF AUTHORITIES

PAGE

Van Tran v. Lindsey, 212 F.3d 1143 (9th Cir. 2000) 17

Williams v. Taylor, 529 U.S. 362 (2000) 7, 11, 13

Wilson v. Mitchell, 250 F.3d 388 (6th Cir. 2001) 17

Yarborough v. Alvarado, 541 U.S. 652 (2004) 9, 10

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2254 ..... 1, 6

28 U.S.C. § 2254(d)(1) ..... i, 7

Petitioners Ari Zavaras, Director of the Colorado Department of Corrections, Rick Soares, Warden, and John Suthers, Attorney General of the State of Colorado respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.[1]

INTRODUCTION

The court of appeals' decision reversed the district court's denial of David Stevens's 28 U.S.C. § 2254 petition for writ of habeas corpus, in which he challenged the admission of an accomplice's recorded and written statements as violating his right to confront the witnesses against him. The decision creates an exacting standard of review in habeas corpus reviews of state court applications of multi-factor balancing tests that conflicts with the deference such applications have been given by this Court, other courts of appeals, and the text of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

Both the Tenth Circuit and the Colorado Supreme Court recognized that this case turns on the outcome of a multi-factor assessment of reliability guided by this Court's decisions in *Roberts v. Ohio*, 448 U.S. 56, 66 (1980), and *Lilly v. Virgina*, 527 U.S. 116 (1999). The court of appeals, however,

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[1] Joseph Ortiz was a party to this case in his official capacity. He has ceased to hold office, thus Ari Zavaras, the present director of the Colorado Department of Corrections, has been substituted pursuant to Sup. Ct. Rule 35(3).

disagreed with a number of the factors – though not the test itself – relied on by the state court. It therefore held that the state court decision was entitled to no deference under the AEDPA.

The decision means that, at least in the context of the many multi-factor balancing tests state courts must apply in criminal trials, convictions are subject to collateral attack any time a state court relies, even in part, on a factor a federal court later finds to be inappropriate. Federal courts applying this precedent in the Tenth Circuit will no longer give deference to state courts, asking whether the state court *unreasonably* applied the test in question, but will simply ask whether the state court's decision was incorrect. This reintroduction of *de novo* review would further muddy the standards applicable to habeas review and merits this Court's attention.

OPINIONS BELOW

The court of appeals' decision is reprinted at App. 1a-38a, and is published at 465 F.3d 1229. The order and judgment of the United States District Court for the District of Colorado is reprinted at App. 1b-61b, and is not otherwise published. The decision of the Colorado Supreme Court is reprinted at App. 1c-89c, and is published at 29 P.3d 305.

JURISDICTION

The Tenth Circuit rendered its decision on October 18, 2006. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

Title 28, Section 2254(d) of the United States Code provides, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States
>
> . . .

STATEMENT

Factual Background

In early 1993, Stevens hired John Swiger to kill David Seiler in order to keep Seiler from testifying in another case in which Stevens was accused of assaulting and kidnapping Seiler. App. 12c-13c. On February 28, 1993, Swiger shot and killed Seiler near Stevens's home, and later Swiger and Stevens disposed of the murder weapon. App. 12a; App. 17c. Swiger moved to Tennessee a few days later. App. 18c.

In 1995, Swiger was arrested in Tennessee in connection with the investigation of an unrelated robbery and attempted murder. App. 19c. Tennessee law enforcement officials learned that Swiger had been bragging about participating in a killing in Colorado and contacted Colorado authorities, and detectives from Aurora, Colorado traveled to Tennessee to interview Swiger. App. 12a-13a; App. 19c. Swiger gave a lengthy tape-recorded interview and a short written statement in which he admitted that Stevens asked him to murder Seiler for $5,000 down and $5,000 after the killing. App. 13a-15a.

State Court Proceedings

Stevens was charged with first-degree murder, conspiracy, and criminal solicitation to commit the first-degree murder of David Seiler. Stevens received a jury trial in June 1996. Prior to trial, the prosecution and Stevens's counsel

stipulated that Swiger was unavailable to testify because he would choose to exercise his Fifth Amendment right not to testify, as in fact he later did. Both Swiger's tape-recorded and written statements were admitted as evidence. App. 15a-16a. The jury found Stevens guilty on all three counts, and Stevens was sentenced to a mandatory life sentence for the first-degree murder and additional concurrent and consecutive sentences for the other related crimes. App. 16a-17a; App. 13c.

On direct appeal, the Colorado Court of Appeals affirmed Stevens's conviction. *People v. Stevens*, No. 96CA1685 (Colo. App. November 19, 1998) (not selected for publication). App. 9b-10b. The Colorado Supreme Court accepted certiorari review, and affirmed the Colorado Court of Appeals. *Stevens v. People*, 29 P.3d 305 (Colo. 2001). App. 1c-89c. The Colorado Supreme Court held that the admission of Swiger's hearsay statement did not violate Stevens's right to confrontation because co-defendant Swiger was unavailable to testify and the statement was given under circumstances that established sufficient reliability App. 22c. The Colorado court considered indicia of reliability including that the statement was strongly against Swiger's interest, that Swiger had voluntarily waived his Miranda rights, that he had not been offered any favorable treatment, and that the statement contained a level of detail that supported a conclusion that Swiger had personal knowledge of the crime. App. 32c-42c.

Stevens filed a petition for writ of certiorari in the United States Supreme Court, which was denied

on April 1, 2002. App. 17a. *Stevens v. Colorado*, 535 U.S. 975 (2002) (No. 01-8074).

Federal Habeas Corpus Proceedings.

On March 27, 2003, Stevens filed a federal habeas corpus application pursuant to 28 U.S.C. § 2254. App. 1b. United States District Court Judge Robert E. Blackburn disagreed with the Colorado Supreme Court's reliance on two factors in assessing the reliability of Swiger's statement, and ruled that this triggered *de novo* review. App. 51b-52b. After a *de novo* review of the remaining factors, the district court ruled that the admission of Swiger's statements did not violate Stevens's Confrontation Clause rights. App. 52b-60b.

The United States Court of Appeals for the Tenth Circuit reversed, finding that the Colorado Supreme Court's reasoning was contrary to clearly established federal law. App. 32a. The court ruled that the Colorado court erred in including four factors in its review of the reliability of Swiger's statements that this Court had refused to credit in *Lilly v. Virginia*. App. 27a-32a. The court held that this rendered the state decision contrary to established federal law, and refused to apply AEDPA deference, even though it agreed with the state court that the question was governed by the open-ended reliability test laid out in *Roberts*. App. 36a-37a.

REASONS FOR GRANTING THE PETITION

As this Court is well aware, the proper standards of review federal courts are to apply on

habeas review are a source of ongoing difficulty for lower courts and litigants, even after the passage of AEDPA, which was intended to provide some guidance in this area. The decision below, rather than clarifying the standards in the context of multi-factor balancing tests, adds to the confusion. This case presents the Court with an opportunity to provide much-needed guidance to lower courts, states, prosecutors, and defendants and their attorneys by making clear that where a state court relies on the proper legal authorities that create a multi-factor test, a conviction should not be overturned merely because a federal habeas court believes some of the factors included in the analysis by the state court were incorrect.

I. The Court should clarify whether a federal court owes deference to a state court's application of a multi-factor balancing test or may grant relief under AEDPA based solely on its decision that the state court's interpretation or application of the test was incorrect.

1. Under the provision of AEDPA relevant here, federal courts may not grant habeas corpus relief from a state court decision on the merits unless that decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

In *Williams v. Taylor*, 529 U.S. 362, 404 (2000), Justice O'Connor's opinion for the Court

made clear that "Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court." Federal courts must "accord[] both the 'contrary to' and 'unreasonable application' clauses independent meaning." *Id.* at 405.

The *Williams* Court explicitly adopted the Fourth Circuit's approach, under which a state court decision is held to be contrary to established law only if it "arrives at a conclusion opposite to that reached by this Court on a question of law" or "arrives at a result opposite to" a relevant case presenting "facts that are materially indistinguishable." Id. (*citing Green v. French*, 143 F.3d 865, 869-70 (4th Cir. 1998)).

Respecting the second clause of this provision, a state court decision involves an "unreasonable application" of Supreme Court precedent if the state court "identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 409. Thus, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411.

The *Williams* Court therefore established two important principles that should guide this case. First, the "contrary to" clause of Section 2254(d)(1) should only be applied when a state court has failed

to identify or apply the correct controlling precedent of this Court. Otherwise, if the "contrary to" clause is read to permit a federal court "to issue the writ whenever it concludes that the state court's application of clearly established federal law was incorrect, the 'unreasonable application' clause becomes a nullity." *Id.* at 407. Second, "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.* at 410 (emphasis in original).

2. Since *Williams*, this Court has continued to recognize that lower courts are struggling to correctly interpret the § 2254 standards for federal habeas review. For example, in *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003), the Court found no unreasonable application where United States Supreme Court precedents "have not been a model of clarity."

Additionally, the Court has provided general guidance in *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004), stating that "whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway [state] courts have in reaching outcomes in case-by-case determinations."

Importantly, this Court has not directly addressed how the AEDPA standards interact with a multi-factor balancing test, such as the *Ohio v. Roberts* test in question here. The Court has, however, described the *Roberts* test as being "amorphous" and "unpredictable:"

> Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable.

Crawford v. Washington, 541 U.S. 36, 63 (2004).

As the *Lockyer* and *Yarborough* decisions show, the open-ended and amorphous nature of the *Roberts* inquiry, like other balancing tests, should militate in favor of providing more, rather than less, deference to a state court's analysis. *See also Brown v. Uphoff*, 381 F.3d 1219, 1229 (10th Cir. 2004) (McConnell, J., concurring) (in light of the amorphous and unpredictable character of the *Roberts* test, it is unclear that any particular application can accurately be described as "arriv[ing] at a conclusion opposite to that reached" by the Supreme Court).

3. The Colorado Supreme Court applied the open-ended analysis this Court laid out in *Roberts*, as interpreted in *Lilly*, to determine whether an accomplice's hearsay statement was admissible. App. 30c-31c. As articulated by the Colorado Supreme Court, the issue was:

> The question before us then is whether Swiger's statement bore sufficient guarantees of trustworthiness to satisfy the second prong of the *Roberts* test so that its admission does not violate the Confrontation Clause.

App. 30c, citing *Lilly*, 527 U.S. at 133-134.

Likewise, the Tenth Circuit held that the case turned on whether the statement "[bore] particularized guarantees of trustworthiness sufficient to rebut the presumption of unreliability." App. 37a & n.4 (citing *Roberts* and *Lilly*).

Thus, the Tenth Circuit agreed that Colorado courts had applied the correct legal test. Nevertheless, the court granted the writ because, in its analysis of that test, the Colorado court included certain factors the Tenth Circuit believed *Lilly* had rejected. *See* App. 27a-32a. The court held that this rendered the Colorado decision contrary to Supreme Court precedent, and therefore it refused to apply any AEDPA deference or even to inquire into whether the Colorado decision was objectively unreasonable. App. 32a.

Thus the Tenth Circuit effectively adopted a rule whereby any state court decision that rests on a multi-factor test will be subject to successful challenge if the court considered any factors a federal court believes should not be part of the analysis.

This is precisely the approach the *Williams* majority rejected when it held that the AEDPA does not permit a federal habeas court to "issue the writ whenever it concludes that the state court's application of clearly established federal law was incorrect." 529 U.S. at 407. The fact that the court granted the writ without ever discussing whether the Colorado decision was an unreasonable application of the law is a perfect example of the kind of construction of section 2254(d)(1) that improperly "saps the 'unreasonable application'

clause of any meaning." *Id.* This is a perilous example for other courts to follow, as it turns habeas proceedings into *de novo* reviews of state court legal analyses.

Other courts of appeals have recognized that this is contrary to *Williams* and the AEDPA. For example, in *Cotto v. Herbert*, 331 F.3d 217 (2nd Cir. 2003), the Court of Appeals for the Second Circuit examined a New York state court's analysis of "indicia of reliability" in admitting a witness's out-of-court statement. The Second Circuit disagreed with one of three reliability factors identified by the state court (whether the witness had "no motive" to change his story as an indicia of reliability in admitting hearsay). The court recognized, however, that this was insufficient to render the New York decision "contrary to" clearly established federal law. Because the state court also considered two appropriate factors, the Second Circuit concluded that the conclusion that the hearsay was sufficiently reliable to be admitted was not "objectively unreasonable." *Cotto*, 331 F.3d at 236.

Similarly, in *Hardaway v. Young*, 302 F.3d 757 (7th Cir. 2002), the district court found that the state court's analysis of the voluntariness of a juvenile's confession was an unreasonable application of clearly established Federal law because the state court failed to consider three factors bearing on voluntariness and granted the petition. However, the Court of Appeals for the Seventh Circuit reversed, holding that the balancing of factors performed by the Illinois courts was not

unreasonable, even assuming that the weighing of factors was "incorrect" *Id.* at 768.

In contrast, the Tenth Circuit in *Stevens* ruled that its disagreement with four of nine reliability factors considered by the state court made the state court's conclusion objectively unreasonable and triggered *de novo* review. These two cases demonstrate the confusion about the level of review that is proper under the AEDPA where a state court is charged with applying a multi-factor balancing test. *See also Dorchy v. Jones*, 398 F.3d 783, 791 (6th Cir. 2005) (finding an unreasonable "interpretation of the *Roberts* standard," based on finding that three of four factors considered by the Michigan court did not support reliability).

This Court could provide much-needed guidance by reaffirming that the AEDPA requires that federal habeas courts defer to state court convictions unless the state court has applied a legal standard that is "diametrically different" from, "opposite in character or nature" from, or "mutually opposed" to Supreme Court precedent or is an objectively unreasonable application of that precedent. *See Williams*, 529 U.S. at 406, 409-10.

At the very least, this Court could make clear that if a habeas court finds itself asking the precise legal question the state court asked (as happened here), the state court decision should not have been rejected as "contrary to" the applicable law.

4. Moreover, by focusing on the fact-specific balancing this Court elected to conduct in *Lilly*, the

court of appeals elevated the Court's *reasoning* into established federal law a state court must follow. This too contradicts the standards for habeas review. *Lilly* was not a habeas case, but a direct review of a state court conviction. *Lilly*, 527 U.S. at 136.[2] The resulting review was fact-specific, as exemplified by the observation that the declarant was "obviously still under the influence of alcohol" as one factor militating against reliability; *see id.* at 139, and could provide little if any explicit direction as to what factors might be present in a different case.

5. Because it agreed with the Colorado Supreme Court that the proper standard in this case was the *Roberts* test, the Tenth Circuit's analysis might fit more comfortably as part of an "unreasonable application" analysis. But had the court undertaken such an analysis, it would have had difficulty granting the writ.

The Colorado Supreme Court employed a number of factors that had previously been credited in other United States Supreme Court and lower federal court cases. App. 22c-29c. The Court also

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[2] Even in the context of certiorari review of a state court opinion, three Justices disagreed that appellate courts should independently review the proffered guarantees of trustworthiness under the second part of the *Ohio v. Roberts* analysis on the basis that the state courts had only addressed reliability in the context of state hearsay rule requirements. *Lilly*, 527 U.S. at 148 (Rehnquist, C.J., O'Connor and Kennedy, JJ., concurring in the judgment).

noted that the facts presented were distinguishable from those in *Lilly*. App. 23c, n. 7 (internal citations omitted) ("This case is clearly distinguishable from *Lilly,* where the accomplice confessed to being involved in a crime spree with his co-defendants, which included robberies and a murder, but denied any involvement in the murder, the most serious crime committed. In our view, the confession in *Lilly* was not genuinely self-inculpatory.").

The district court identified nine factors the Colorado Supreme Court had considered in assessing the reliability of the accomplice's statement: (1) whether the statement was truly self-inculpatory; (2) whether the statement was made while Swiger was in custody for the crime being investigated; (3) whether Swiger was subjected to leading questions; (4) whether Swiger's statement was detailed enough to indicate that Swiger was likely to have personal knowledge of the events in the statement; (5) whether the details could be confirmed independently; (6) whether police officers threatened or coerced Swiger to make the statement; (7) whether the confession was offered in exchange for leniency; (8) whether Swiger had a reason to retaliate against Stevens; and (9) whether Swiger was mentally or physically unstable at the time of the confession. App. 28b-29b.

The Colorado Supreme Court concluded that the circumstances surrounding the making of the statement provided sufficient guarantees of trustworthiness. App. 42c. Even if the Tenth Circuit was correct that the Colorado court erred in emphasizing some of these factors, and even if the

Tenth Circuit's *de novo* review of the question is correct, it is hardly clear that the Colorado court's decision was objectively unreasonable. Indeed, the decision of the district court rejecting the writ on *de novo* review underscores that the Colorado court's decision was, at least, a reasonable one.

II. The Tenth Circuit's Rule Would Impact a Wide Range of Cases.

Petitioner recognizes that in *Crawford* this Court replaced the *Roberts* test, and indeed cited the Colorado Supreme Court's decision in *Stevens* among the examples of the unworkability of that test. *See* 541 U.S. at 63. This case nevertheless merits this Court's review because the dispute here is unrelated to Roberts --- as noted above, both the Tenth Circuit and the Colorado court agreed that that was the proper test. The dispute Petitioner asks this Court to resolve involves an issue of much broader consequence: Do federal courts reviewing state convictions on petitions for habeas courts owe any deference to state court applications of multi-factor tests? Under the Tenth Circuit's rule, if the federal court disagrees with any factor the state court included in its analysis, "AEDPA deference does not apply." App. 32a. This rule, if allowed to stand, would effectively remove large areas of criminal law from the coverage of the AEDPA.

A few examples of the many areas in which federal habeas courts assess state court applications of multi-factor balancing tests or other open-ended totality-of-the-circumstances inquiries should suffice to show the reach of the Tenth Circuit's decision

- The voluntariness of a juvenile's confession. *See, e.g., Hardaway v. Young*, 302 F.3d 757, *supra* (finding that balancing by state courts was not unreasonable).

- The existence of probable cause for an arrest. *See, e.g., Van Tran v. Lindsey*, 212 F.3d 1143, 1157 (9th Cir. 2000) (holding that where there is an overall multi-factor test, the clearly established federal law consists of the multi-factor test itself, not of any particular applications of the test).

- The existence of a valid *Miranda* waiver. *See, e.g., Hart v. Attorney General*, 323 F.3d 884 (11th Cir. 2003) (analyzing totality of the circumstances *de novo* because state court failed to do so).

- A violation of the right to a speedy trial. *See Rashad v. Walsh*, 300 F.3d 27, 44 (1st Cir. 2002) (state's overall balancing of the relevant factors, not its handling of any single factor, is the proper focal point in this case).

- The admissibility of an out-of-court identification. *See, e.g., Wilson v. Mitchell*, 250 F.3d 388, 398 (6th Cir. 2001) (The Ohio Court of Appeals did not unreasonably apply the totality of the circumstances analysis to the out-of-court identification procedures in question).

Because multi-factor balancing is used so frequently in criminal cases, this Court should address how such balancing interacts with the deference owed to a state court under the AEDPA. The approach taken by the Tenth Circuit improperly eliminates the required deference and results in *de novo* review where any aspect of the state court's balancing process improperly weighs any factors. In doing so, the Tenth Circuit has adopted a rule that conflicts with AEDPA, this Court's precedents, and the decisions of a number of other courts of appeals.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully Submitted,

John W. Suthers
Attorney General

Daniel D. Domenico
Solicitor General

Catherine P. Adkisson*
Assistant Solicitor General
Laurie A. Booras
First Assistant Attorney General
1525 Sherman St., 7th Floor
Denver, CO 80203
(303) 866-5785

*Counsel of record

APPENDIX A

465 F.3d 1229

Briefs and Other Related Documents

United States Court of Appeals,
Tenth Circuit.
David P. STEVENS, Petitioner-Appellant,
v.
Joseph ORTIZ, Director, Colorado Department of Corrections; Rick Soares, Warden; and John Suthers, Attorney General, State of Colorado, Respondents-Appellees.
No. 05-1250.
Oct. 18, 2006.

Background: Following affirmance of petitioner's state court convictions for first-degree murder, conspiracy to commit first-degree murder, and solicitation to commit first-degree murder, 29 P.3d 305, he filed petition for writ of habeas corpus. The United States District Court for the District of Colorado, Robert E. Blackburn, J., denied petition. Petitioner appealed.

Holdings: The Court of Appeals, Henry, Circuit Judge, held that:
(1) state Supreme Court's decision that the admission of accomplice's inculpatory statements did not violate petitioner's Confrontation Clause rights was contrary to clearly established federal law, and thus, was not entitled to deference upon habeas review, and
(2) admission of accomplice's confession violated the

Confrontation Clause.

Reversed and remanded.

West Headnotes

[1] KeyCite Notes

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k452 k. Federal or Constitutional Questions. Most Cited Cases

A state court decision is "contrary to" clearly established federal law, as may warrant habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA), if the state court (1) applies a rule that contradicts the governing law set forth in Supreme Court cases, or (2) confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from the Supreme Court's precedent. 28 U.S.C.A. § 2254(d)(1).

[2] KeyCite Notes

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial

Cases

197k452 k. Federal or Constitutional Questions. Most Cited Cases

A state court's decision is not "contrary to" clearly established federal law, for purpose of determining whether habeas relief is warranted under the Antiterrorism and Effective Death Penalty Act (AEDPA), even if a state court has no awareness of controlling Supreme Court precedent, so long as neither the reasoning nor the result of the state court decision contradicts Supreme Court precedent. 28 U.S.C.A. § 2254(d)(1).

[3] KeyCite Notes

197 Habeas Corpus

197III Jurisdiction, Proceedings, and Relief

197III(C) Proceedings

197III(C)4 Conclusiveness of Prior Determinations

197k765 State Determinations in Federal Court

197k769 k. Existence and Adequacy of Record or Findings. Most Cited Cases

When reviewing a summary disposition by a state court, a habeas court focuses on its result rather than any reasoning. 28 U.S.C.A. § 2254(d)(1).

[4] KeyCite Notes

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k450.1 k. In General. Most Cited Cases

A federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. 28 U.S.C.A. § 2254(d)(1).

[5] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.1 k. In General. Most Cited Cases

The Confrontation Clause right to confront witnesses applies in both federal and state prosecutions. U.S.C.A. Const.Amend. 6.

[6] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront

Witnesses
110k662.8 k. Out-Of-Court Statements and Hearsay in General. Most Cited Cases

An out-of-court statement that falls within an exception to a hearsay rule under a state's evidentiary rules must nonetheless be excluded from a defendant's trial if its admission would deprive him of his constitutional right of confrontation. U.S.C.A. Const.Amend. 6.

[7] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.11 k. Coconspirators' Statements. Most Cited Cases

The admission of an accomplice's confession, which inculpates the defendant, violates a defendant's Sixth Amendment confrontation rights unless the truthfulness of the statement is so clear from the surrounding circumstances that the test for cross-examination would be of marginal utility. U.S.C.A. Const.Amend. 6.

[8] KeyCite Notes

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k452 k. Federal or Constitutional Questions. Most Cited Cases

The "clearly established" phrase, under the Antiterrorism and Effective Death Penalty Act (AEDPA), refers to the holdings, as opposed to the dicta of the Supreme Court's decisions as of the time of the relevant state-court decision. 28 U.S.C.A. § 2254(d)(1).

[9] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.11 k. Coconspirators' Statements. Most Cited Cases

An accomplice's custodial confession inculpating a defendant, no matter how much the statement incriminates the accomplice, does not fall within a firmly rooted exception to the hearsay rule, for purpose of determining whether admission of that confession at defendant's trial would violate the Confrontation Clause. U.S.C.A. Const.Amend. 6.

[10] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.8 k. Out-Of-Court Statements and Hearsay in General. Most Cited Cases

To avoid a violation of the Confrontation Clause, hearsay evidence admitted against a criminal defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial. U.S.C.A. Const.Amend. 6.

[11] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.8 k. Out-Of-Court Statements and Hearsay in General. Most Cited Cases

In determining whether the admission of a statement violates the Confrontation Clause, courts should not consider the voluntariness of a declarant's statement when assessing its particularized guarantees of trustworthiness.

U.S.C.A. Const.Amend. 6.

[12] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.11 k. Coconspirators' Statements. Most Cited Cases

The absence of an express promise of leniency by the police to an accomplice does not enhance his statements' reliability to the level necessary for their untested admission, for Confrontation Clause purposes. U.S.C.A. Const.Amend. 6.

[13] KeyCite Notes

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k481 k. Conduct of Trial, in General. Most Cited Cases

State Supreme Court's decision, that the admission of accomplice's confession did not violate petitioner's Confrontation Clause rights, was contrary to clearly established federal law, and thus, the decision was not entitled to deference upon habeas review, under

the Antiterrorism and Effective Death Penalty Act (AEDPA); the state Supreme Court considered the genuinely self-inculpatory nature of accomplice's confession as the most important factor in determining the statement's reliability, and it also considered other trial evidence to corroborate the statement, the voluntary nature of the statement, and the absence of a promise of leniency by law enforcement authorities. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d)(1).

[14] KeyCite Notes

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)4 Conclusiveness of Prior Determinations
197k765 State Determinations in Federal Court
197k768 k. Presumptive Accuracy of State Determination, and Rebuttal of Presumption. Most Cited Cases

197 Habeas Corpus KeyCite Notes
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review
197k846 k. Clear Error. Most Cited Cases

A Court of Appeals reviewing the denial of a habeas petition presumes the factual findings of the state

court and the federal district court are correct unless clearly erroneous. 28 U.S.C.A. § 2254(d)(1).

[15] KeyCite Notes

⇐110 Criminal Law
⇐110XX Trial
⇐110XX(C) Reception of Evidence
⇐110k662 Right of Accused to Confront Witnesses
⇐110k662.11 k. Coconspirators' Statements.
Most Cited Cases

Accomplice's confession did not bear particularized guarantees of trustworthiness, and thus, its admission violated defendant's Confrontation Clause rights, in prosecution for first-degree murder, conspiracy to commit murder, and solicitation to commit murder; the confession was made to police detectives during a custodial interrogation, accomplice consistently described defendant as the planner of the murder, accomplice minimized his own role as the shooter by claiming that he was drunk and on drugs at the time, the detectives suggested to accomplice that his family would be protected as a result of his statement, and the confession was the product of leading questions during the interrogation. U.S.C.A. Const.Amend. 6.

Madeline S. Cohen, Assistant Public Defender

(Raymond P. Moore, Federal Public Defender, with her on the briefs), Denver, CO, for Petitioner-Appellant.
Laurie A. Booras, First Assistant Attorney General, Appellate Division, Criminal Justice Section (John W. Suthers, Attorney General, with her on the brief), State of Colorado, Denver, CO, for Respondents-Appellees.

Before HENRY, ANDERSON, and McCONNELL, Circuit Judges.

HENRY, Circuit Judge.
John Swiger stated in police custody that he shot and killed David Seiler under the orders of the Petitioner-Appellant David P. Stevens. At Mr. Stevens's state trial, Mr. Swiger did not testify, but his statement was admitted into evidence over Mr. Stevens's objection. A jury convicted Mr. Stevens of first-degree murder and other counts. On direct appeal, the Colorado Supreme Court concluded that the admission of Mr. Swiger's confession did not violate Mr. Stevens's rights under the Confrontation Clause. The federal district court denied Mr. Stevens's petition for a writ of habeas corpus under 28 U.S.C. § 2254, and he timely appeals. We must decide here if the Colorado trial court violated Mr. Steven's Sixth Amendment rights when it admitted the custodial confession of Mr. Swiger, a non-testifying accomplice, that also inculpated Mr. Stevens in a murder-for-hire.
We conclude that the reasoning of the Colorado Supreme Court was contrary to clearly established

federal law, and the introduction of the accomplice confession violated Mr. Stevens's rights under the Confrontation Clause. Further, the Sixth Amendment error was not harmless. Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253(a) and (c), we reverse the district court's denial of Mr. Stevens's § 2254 petition and remand to the district court for entry of the writ.

(Cite as: 465 F.3d 1229, *1232)

I. BACKGROUND

We briefly summarize the underlying facts and earlier court proceedings. The Colorado Supreme Court described the pertinent facts in more detail. *See Stevens v. People*, 29 P.3d 305, 308-10 (Colo.2001); *id.* at 319-22 (Bender, J., concurring in part and dissenting in part).

A. *Mr. Seiler's death and Mr. Swiger's statements*

On the evening of February 28, 1993, David Seiler was shot and killed in front of Mr. Stevens's house in Aurora, Colorado. Police initially investigated Mr. Stevens and Mr. Swiger as suspects in the death but filed no charges. Mr. Swiger had known Mr. Seiler through Mr. Stevens's drug operations. Soon after the murder, Mr. Swiger, his girlfriend (Bonnie Clontz), and a young woman who was with Mr. Seiler the night he was shot (Tina Parks) moved to Tennessee.

Two years later, Aurora detectives learned that Mr. Swiger had been bragging to friends in Tennessee about killing Mr. Seiler. In January 1995, Aurora Detectives Joe Petrucelli and Tony Rodriguez

traveled to a Tennessee county jail to speak with Mr. Swiger about his involvement in Mr. Seiler's death. The detectives informed Mr. Swiger of his *Miranda* rights, and he agreed to answer questions. Rec. doc. 12, ex. A, App. I, at 2 ("Swiger Tr."). That interrogation and subsequent written statement form the basis of this appeal.

1. *Initial denial of involvement*

Early in the interview, Mr. Swiger said that Mr. Stevens asked him to murder Mr. Seiler to prevent Mr. Seiler from testifying against Mr. Stevens and two associates in an upcoming trial. Mr. Stevens offered to pay $5,000 then and $5,000 after the murder. When Mr. Swiger said he needed time to think about the offer, Mr. Stevens threatened to hurt his family and kill him.

During the first two-thirds of the interview, Mr. Swiger repeatedly denied killing Mr. Seiler on February 28, 1993. Mr. Swiger told the Aurora detectives he was at home that evening with his family and did not go to a party at Mr. Stevens's house because he was watching his children. Mr. Swiger stated he had only helped Mr. Stevens to dispose of a .38 revolver that may have been involved with the murder. When the detectives asked who shot Mr. Seiler, Mr. Swiger responded that "some guy by the name of Mike" had carried out the murder. *Id.* at 29. Before Mr. Swiger gave more details about Mike, he asked the detectives for assurances they would protect his family. Mr. Swiger later stated several times that he was afraid Mr. Stevens would kill his family and him if he spoke out about Mr. Stevens's murder plot.

Despite Mr. Swiger's denial of any involvement in

the murder, the detectives continued to ask him whether excessive drug and alcohol use that evening could have prevented him from remembering that he had shot Mr. Seiler. Mr. Swiger repeatedly said he was drunk the night of the murder and for several subsequent months. He also stated that he had used acid and cocaine on the day before Mr. Seiler's murder. Detective Petrucelli asked Mr. Swiger about how Mr. Stevens had pressured him to carry out the murder, and the detective encouraged Mr. Swiger to explain his role to "get this off [his] chest." *Id.* at 53. Mr. Swiger began to cry and responded multiple times that "I'm not sure." *Id.*

The detectives told Mr. Swiger they could not "make [him] any deals," but promised to keep Ms. Clontz and their children safe. *Id.* at 54. Mr. Swiger asked twice to speak with Ms. Clontz, but

the detectives refused his request. Mr. Swiger insisted that she had nothing to do with the murder and sought assurance from the detectives that she would not be prosecuted.

2. *Later confession*

After the detectives said they would not prosecute Ms. Clontz, Mr. Swiger changed his story (at page 61 of the 73-page interview transcript) and described a direct role in the murder. Mr. Swiger said he received a call on the night of the murder to drive promptly to Mr. Stevens's house, where Mr. Seiler would soon be leaving. Mr. Swiger stated that he then directed Ms. Clontz to go to the liquor store and buy cigarettes, without informing her of any plan to

shoot Mr. Seiler. Mr. Swiger said he then drove to Mr. Stevens's house, parked in a nearby alley, and got out of his car. When Mr. Seiler walked out of the house, he fired twice from a back gate near the house, and then "took off runnin' [and] jumped back in the Mustang" to return to his residence "before Bonnie [Clontz] got back." *Id.* at 63. Mr. Swiger stated that he shot at Mr. Seiler but did not intend to kill him.

Mr. Swiger later responded that Mr. Stevens had specifically directed Mr. Swiger to shoot Mr. Seiler. Mr. Swiger also indicated that he knew he was a suspect in the Colorado murder when the interview began. The detectives had earlier told Mr. Swiger that he was a suspect and that they had already interviewed Ms. Clontz. Finally, when asked if the detectives had offered any promises or deals for his statement, Mr. Swiger said, "No, sir, jus' that ... if I told the truth, my family'd be protected." *Id.* at 72. After more than two hours of interrogation, Mr. Swiger wrote and signed a statement that summarized his confession.

B. *Trial and direct appeal*

Mr. Stevens and Mr. Swiger were charged in connection with Mr. Seiler's death and tried separately in Colorado court. Prior to Mr. Stevens's trial, Mr. Swiger asserted his Fifth Amendment privilege against self-incrimination, and the prosecution offered Mr. Swiger's recorded and written statements. Mr. Stevens filed a motion in limine to exclude the statements. The state district court found the statements against Mr. Swiger's penal interest and admitted the accomplice confession under Colo. R. Evid. 804(b)(3). [FN1]

FN1. Rule 804(b) provides that "[t]he following are not excluded by the hearsay rule if the declarant is unavailable as a witness:" ...

(3) A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

At trial, the prosecution introduced into evidence Mr. Swiger's taped statement--played in full to the jury--and the subsequent written confession. Mr. Swiger's custodial statement was the only direct evidence connecting Mr. Stevens to Mr. Seiler's death. After the jury deliberated for approximately 90 minutes, it asked to hear parts of Mr. Swiger's recorded statement. Shortly after hearing the full taped statement again, the jury reached a verdict. It convicted Mr. Stevens of (1) first-degree murder after deliberation, in violation of Colo.Rev.Stat. § 18-3-102; (2) conspiracy to commit first-degree murder, in violation of Colo.Rev.Stat. § 18-2-201; and (3) solicitation to commit first-degree murder, in violation of

Col.Rev.Stat. § 18- 2-301. The district court sentenced Mr. Stevens to life imprisonment on the first-degree murder count, and to 24 years' imprisonment each on the conspiracy and solicitation counts. The court ordered the three sentences to run concurrently, but consecutive to a life sentence that Mr. Stevens was already serving on an unrelated conviction.

Mr. Stevens appealed his conviction to the Colorado Court of Appeals, arguing that the admission of Mr. Swiger's custodial statement without cross-examination violated his rights under the Confrontation Clause. The Colorado Court of Appeals affirmed. On appeal, the Colorado Supreme Court granted certiorari and affirmed. *Stevens*, 29 P.3d at 308. The Colorado Supreme Court concluded that Mr. Swiger's statement did not fall within a firmly rooted hearsay exception but nonetheless found the statement "admissible because it contained sufficient guarantees of trustworthiness." *Id.* Justice Bender, joined by Justice Martinez, dissented from the majority's conclusion that Mr. Swiger's statement bore sufficient indicia of reliability. *See id.* at 318- 33 (Bender, J., concurring in part and dissenting in part). The United States Supreme Court denied certiorari on April 1, 2002.

C. *Federal habeas corpus proceedings*

Mr. Stevens timely filed a 28 U.S.C. § 2254 habeas corpus petition, and the federal district court appointed counsel for him. The district court examined the factors that the Colorado Supreme Court had considered to find Mr. Swiger's untested

statement reliable. It rejected some of the Colorado court's analysis, concluding that the state court had ruled contrary to clearly established federal law by considering both the voluntariness of Mr. Swiger's statement and evidence that corroborated the details of his confession. Based on this ruling, the district court reviewed the Confrontation Clause issue de novo, no longer applying deference under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See* Brown v. Uphoff, 381 F.3d 1219, 1225 (10th Cir.2004), *cert denied*, 543 U.S. 1079, 125 S.Ct. 940, 160 L.Ed.2d 822 (2005).

On de novo review, the district court held that the admission of Mr. Swiger's custodial statement without cross-examination did not violate Mr. Stevens's rights under the Confrontation Clause. According to the district court, the statement was (1) truly self-inculpatory, (2) detailed, (3) not offered in exchange for leniency, (4) based upon Mr. Swiger's personal knowledge of the events, (5) not given in retaliation against Mr. Stevens, and (6) given by a declarant who was mentally and physically stable. These factors indicated that the statement was sufficiently reliable.

Mr. Stevens timely appealed, and the district court granted a certificate of appealability on whether the Colorado court's admission of Mr. Swiger's statement violated Mr. Stevens's Sixth Amendment rights.

II. STANDARD OF REVIEW

Under AEDPA, we may only grant Mr. Stevens habeas relief if the Colorado Supreme Court's adjudication "resulted in a decision that was [1] contrary to, or [2] involved an unreasonable

application of, clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

[1] [2] [3] The first ground for relief under AEDPA, a decision that is "contrary to ... clearly established federal law," *id.*, is met if the state court (1) "applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or (2) "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] 3

Court and nevertheless arrives as a result different from [the Court's] precedent." *Williams v. Taylor*, 529 U.S. 362, 406, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A state court's decision is not contrary to clearly established federal law even if a state court has no awareness of controlling Supreme Court precedent, "so long as neither the reasoning nor the result of the state-court decision contradicts [Supreme Court] precedent." *Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002). When we review a summary disposition by a state court, we focus on its result rather than any reasoning. *Saiz v. Ortiz*, 392 F.3d 1166, 1176 (10th Cir.2004), *cert denied*, --- U.S. ----, 125 S.Ct. 2976, 162 L.Ed.2d 899 (2005); *Aycox v. Lytle*, 196 F.3d 1174, 1177 (10th Cir.1999).
However, when applying AEDPA to fully reasoned opinions by state courts, this circuit has not focused solely on the result "where the state court's explicit *reasoning* contravenes Supreme Court precedent."

Brown, 381 F.3d at 1225 (emphasis added). In *Brown*, we concluded that a state court's reasoning in a Confrontation Clause challenge was contrary to clearly established federal law because it had relied on factors "inappropriate for determining whether a statement is trustworthy." *Id.* We did not apply AEDPA deference and instead reviewed de novo--under the correct factors identified by Supreme Court precedent--whether a constitutional violation occurred. *Id.*; *see also Fulcher v. Motley*, 444 F.3d 791, 805-06 (6th Cir.2006) (reviewing a Confrontation Clause challenge de novo after first holding that the state court's multi-factor test contravened Supreme Court precedent because it considered improper factors).

[4] The second ground for relief under AEDPA--a state court's unreasonable application of clearly established Supreme Court precedent--is met if the state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.* at 407- 08, 120 S.Ct. 1495. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411, 120 S.Ct. 1495.

III. AEDPA REVIEW

First, we identify clearly established federal law "existing at the time the defendant's conviction became final." *Williams*, 529 U.S. at 381, 120 S.Ct. 1495. Second, we examine whether the Colorado

Supreme Court ruled contrary to, or unreasonably applied such law in its decision. [FN2]

FN2. In *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Supreme Court held that testimonial hearsay may be admitted against a defendant at trial "only where the declarant is unavailable, and only where the defendant has a prior opportunity to cross-examine." *Crawford* does not affect our analysis. Mr. Stevens's conviction became final on April 1, 2002, when the United States Supreme Court denied certiorari with regard to the Colorado Supreme Court's decision on direct appeal. *Crawford* was decided on March 8, 2004, and
we do not apply the decision retroactively to cases on collateral review. *Brown*, 381 F.3d at 1225-27.

A. *Clearly established federal law*

[5] [6] The Sixth Amendment of the United States Constitution guarantees an individual accused of a criminal offense the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. This right applies in both federal and state prosecutions. *Pointer v. Texas*, 380 U.S. 400, 406, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). "The combined effect of ... confrontation--

physical presence, oath, cross-examination, and observation of demeanor by the trier of fact--serves

the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." *Maryland v. Craig*, 497 U.S. 836, 846, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). Accordingly, an out-of-court statement that falls within an exception to a hearsay rule under a state's evidentiary rules must nonetheless be excluded from a defendant's trial if its admission would deprive him of his constitutional right of confrontation. *See Dutton v. Evans*, 400 U.S. 74, 80-82, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970).

Prior to *Crawford*, Supreme Court precedent addressing Confrontation Clause rights held that a testimonial hearsay statement is admissible only if the declarant is unavailable, and only if the statement (1) satisfies "a firmly rooted" exception to the hearsay rule or (2) bears "particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). This two-part framework was "unpredictable," *Crawford*, 541 U.S. at 63, 124 S.Ct. 1354, in part because the Court "decline[d] to endorse a mechanical test" for assessing trustworthiness, *Idaho v. Wright*, 497 U.S. 805, 822, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). Nonetheless, pre-*Crawford* decisions identify several factors that courts should (and should not) consider when determining whether an accomplice's statement is sufficiently reliable to be admitted without cross-examination.

The most relevant Supreme Court decision for our review is *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999). In that case, the

petitioner Ben Lilly, his brother Mark, and a friend were arrested for a two-day crime spree during which they killed one victim. During police questioning, Mark admitted to certain crimes but stated that Ben and their friend had stolen the guns and Ben had actually shot the victim. *Id.* at 120-21, 119 S.Ct. 1887. At Ben's trial, Mark invoked his Fifth Amendment rights and did not testify, but the district court admitted Mark's statements that described Ben as the mastermind and actual shooter. A jury later convicted Ben of murder and other crimes. Ben appealed his conviction and argued that admitting the confession of his brother, a non-testifying accomplice, violated his Confrontation Clause rights. The Virginia Supreme Court affirmed the statement's admission.

A plurality opinion by Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, concluded that the admission of Mark's custodial statement, untested by cross-examination, violated Ben's rights under the Confrontation Clause. The plurality first determined that the accomplice's statement, shifting blame to a criminal defendant, was not within a firmly rooted exception to the hearsay rule. *See id.* at 133, 119 S.Ct. 1887.

[7] The *Lilly* plurality then evaluated whether the statement bore sufficient indicia of reliability to be admitted without cross-examination. The plurality noted that "[i]t is highly unlikely that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted when ... the government is involved in the statements' production, and when

the statements describe past events and have not been subjected to adversarial testing." *Id.* at 137, 119 S.Ct. 1887. Thus, admission of an accomplice's confession violates a defendant's Sixth Amendment rights unless the truthfulness of the statement "is so clear from the surrounding circumstances that the test for cross-examination would be of marginal utility." **3**

Id. at 136, 119 S.Ct. 1887 (quoting *Wright*, 497 U.S. at 820, 110 S.Ct. 3139).

The *Lilly* plurality identified certain factors improperly considered by the Virginia Supreme Court that should have had little, if any, influence in an analysis for "particularized guarantees of trustworthiness." For example, a declarant's awareness of his *Miranda* rights does not "render the circumstances surrounding his statements significantly more trustworthy." *Lilly*, 527 U.S. at 138, 119 S.Ct. 1887. The Supreme Court had earlier concluded in *Lee v. Illinois*, 476 U.S. 530, 544, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986) that the voluntariness of an accomplice's confession "does not bear on the question of whether the confession was also free from any desire, motive, or impulse [the declarant] may have had either to mitigate the appearance of his own culpability by spreading the blame or to overstate [the defendant's] involvement [in the crimes at issue]."

In *Lilly*, the plurality also described how a court cannot rely on outside evidence to validate a declarant's unchallenged hearsay statement. "[The

fact] [t]hat other evidence at trial corroborated portions of [a declarant's] statements is irrelevant." *Lilly*, 527 U.S. at 137, 119 S.Ct. 1887; *see also Wright*, 497 U.S. at 822, 110 S.Ct. 3139 (rejecting the "contention that evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears 'particularized guarantees of trustworthiness' ") (quoting *Roberts*, 448 U.S. at 66, 100 S.Ct. 2531).

The *Lilly* plurality addressed several other factors. It noted that a declarant's self-inculpatory statement is "suspect insofar as [he] inculpate[s] other persons. That a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts." *Lilly*, 527 U.S. at 139, 119 S.Ct. 1887 (quoting *Williamson v. United States*, 512 U.S. 594, 599, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994)). Further, the plurality stated, "the absence of an express promise of leniency to [the declarant] does not enhance his statements' reliability to the level necessary for their untested admission." *Id.* Finally, the plurality expressed concern about an officer's use of leading questions during a custodial confession; a declarant in that position has "a natural motive to attempt to exculpate himself as much as possible." *Id.*

Notably, the concurring opinions of Justices Scalia and Thomas also concluded that the admission of the accomplice's statement violated the Confrontation Clause. Both Justices adopted a categorical approach. *See id.* at 143, 119 S.Ct. 1887 (Scalia, J., concurring in part and concurring in the judgment) (referring to the admission of Mark's statement as a "paradigmatic Confrontation Clause violation"); *id.*

at 143-44, 119 S.Ct. 1887 (Thomas, J., concurring in part and concurring in the judgment).

[8] We reject the state's argument that the holdings of the four-Justice *Lilly* plurality are not clearly established federal law. Under § 2254(d)(1), the "clearly established" phrase "refers to the holdings, as opposed to the dicta of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412, 120 S.Ct. 1495. In *Lilly*, the categorical rule outlined by Justices Scalia and Thomas reads the requirements of the Confrontation Clause more broadly than the plurality. We take into account these concurrences and characterize the narrower standards set forth in Justice Stevens's plurality opinion as the "holding"--and therefore clearly established federal law. *See Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). This treatment is consistent

with other circuits that have applied *Lilly's* plurality opinion under AEDPA. *See Fulcher v. Motley*, 444 F.3d 791, 800 n. 4 (6th Cir.2006); *Murillo v. Frank*, 402 F.3d 786, 791 (7th Cir.2005); *Forn v. Hornung*, 343 F.3d 990, 995 n. 4 (9th Cir.2003) (citation omitted) (holding that "*Lilly* is 'clearly established federal law' for purposes of AEDPA").

B. *AEDPA review of the Colorado court's decision*

Based on several factors, the Colorado Supreme Court concluded that Mr. Swiger's statement to detectives in Tennessee had sufficient guarantees of

trustworthiness to be admissible without cross-examination. *Stevens*, 29 P.3d at 314-18. Mr. Stevens challenges the state court's reliance on four of these factors as supporting reliability: that (1) the statement was genuinely self-inculpatory; (2) independent evidence corroborated it, (3) the statement was voluntary; and (4) the detectives did not promise leniency to Mr. Swiger.

1. *Self-inculpatory nature of Mr. Swiger's statement*

Mr. Stevens first argues that the Colorado Supreme Court ruled contrary to Supreme Court precedent when it stated that "the most important determination as to its trustworthiness is whether the statement at issue is genuinely self-inculpatory or whether it shifts the blame from the confessor to the defendant." *Stevens*, 29 P.3d at 314. The state court found Mr. Swiger's statement was "genuinely self-inculpatory" because he "did not minimize his involvement in the murder nor did he shift the responsibility for committing the murder to the defendant." *Id.* at 315.

[9] In *Lilly*, only three Justices believed "a genuinely self-inculpatory statement [in custody] that also inculpates a codefendant" might satisfy a firmly rooted hearsay exception. 527 U.S. at 146, 119 S.Ct. 1887 (Rehnquist, C.J., concurring in the judgment). Instead, the *Lilly* plurality (along with Justices Scalia and Thomas) expressly rejected Chief Justice Rehnquist's concurrence. A majority of the Court thus held that an accomplice's custodial confession inculpating a defendant--no matter how much the statement incriminates the declarant--does not fall within a firmly rooted exception to the

hearsay rule. *Id.* at 134 and n. 5, 119 S.Ct. 1887. Importantly, *Lilly* also concluded that portions of a statement exposing a declarant to criminal liability added no reliability to the non-self-inculpatory parts of the statement that inculpate a co-defendant. *Id.* at 138-39, 119 S.Ct. 1887 ("[A]s we have explained, such statements [against penal interest] are suspect insofar as they inculpate other persons."); *accord Williamson*, 512 U.S. at 599-600, 114 S.Ct. 2431; *Lee*, 476 U.S. at 545, 106 S.Ct. 2056.

Accordingly, we conclude that the Colorado court erred not only by assigning relevance to whether a statement is genuinely self-inculpatory, but also by elevating that irrelevant factor to the forefront in its reliability determination. The Colorado Supreme Court's reasoning was therefore contrary to clearly established federal law.

2. *Corroborating evidence*

[10] KC Mr. Stevens next maintains that the Colorado Supreme Court ruled contrary to *Lilly* and *Wright* by relying on the existence of evidence corroborating Mr. Swiger's statement to support its reliability. In *Wright*, the Supreme Court held that hearsay evidence admitted against a criminal defendant "must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." 497 U.S. at 822, 110 S.Ct. 3139. In *Lilly*, the Court reiterated the principle: "[t]hat other evidence at trial corroborated portions of Mark's

statement is irrelevant." 527 U.S. at 137, 119 S.Ct. 1887. Corroboration of portions of an accomplice's confession by other trial evidence creates "a very real danger that a jury will rely on partial corroboration to infer the trustworthiness of the entire statement." *Wright*, 497 U.S. at 824, 110 S.Ct. 3139.

Here, the Colorado court "[e]xamin[ed] the record" and "[found] that Swiger provided many details concerning the murder and the defendant's participation that could be independently confirmed." *Stevens*, 29 P.3d at 317. "Swiger displayed a depth of knowledge about the relationship between the defendant and the victim that gives credibility to his claim that the defendant planned the crime." *Id.* The state court considered how Mr. Swiger's interview detailed the shooting at Mr. Stevens's house, the disposal of the gun with Mr. Stevens's assistance, Mr. Stevens's motive for killing Mr. Seiler, and Mr. Stevens's rationale for believing that Mr. Swiger would carry out the murder. *Id.*

The federal district court concluded the state court had ruled contrary to *Wright* by relying on details in Mr. Swiger's statement that other trial evidence could corroborate:

> Swiger's statements concerning Steven[s's] motive for killing Seiler, how Seiler had been kidnaped and beaten by Stevens, how Stevens had helped to dispose of the murder weapon, and Swiger's position and actions at the time of the shooting all may have been supported by corroborative evidence. In this context, the fact that Swiger provided these details should not be considered as indicating that Swiger's statement was reliable.

Rec. vol. I, doc. 31, at 22. We agree that the Colorado

court's reasoning was contrary to federal law because it "bootstrap[ped] on the trustworthiness of other evidence at trial," *Wright*, 497 U.S. at 823, 110 S.Ct. 3139, when it considered independent evidence to corroborate details of Mr. Swiger's statements. *See Fulcher*, 444 F.3d at 805 (concluding that a state court contravened federal law when it relied on additional testimony and evidence from the crime scene to corroborate the accomplice's statement).

3. *Voluntariness*

Mr. Stevens also maintains that the Colorado Supreme Court erred in its trustworthiness evaluation by considering the voluntariness of Mr. Swiger's statements. The state court held that "[a]lthough police investigators did use some leading questions in the interview, Swiger was not coerced and no improper tactics were used. From the record there is no reason to believe that Swiger's statement was anything but voluntary." *Stevens*, 29 P.3d at 316; *see id.* ("Whatever caused Swiger to start talking about the murder in the first place came from within himself and was not the result of government action.").

[11] The Supreme Court has instructed courts not to consider the voluntariness of a declarant's statement when assessing its particularized guarantees of trustworthiness. *Lee*, 476 U.S. at 544-45, 106 S.Ct. 2056. Neither the apparent voluntariness nor prior *Miranda* warnings have any "bearing on the likelihood of truthfulness of [the declarant's] statements." *Lilly*, 527 U.S. at 138, 119 S.Ct. 1887. Further, this circuit has held that "reliance on [voluntariness] is inappropriate for

determining whether a statement is trustworthy," and we have concluded that a state court decision relying on the voluntariness of a declarant's statement was contrary to Supreme Court precedent. *Brown*, 381 F.3d at 1225. Because it considered the voluntariness of Mr. Swiger's statement to support the statement's reliability, the Colorado Supreme Court's reasoning in this case

is similarly contrary to clearly established federal law.

4. *Absence of a promise of leniency*

Finally, Mr. Stevens argues that the state court ruled contrary to *Lilly* when it relied on the absence of a promise of leniency to Mr. Swiger to support its finding that the statement was sufficiently reliable. The Colorado Supreme Court appeared to consider the absence of any express promise of leniency to Mr. Swiger: "The police officers interviewing Swiger expressly informed him on several occasions that he would not receive any deals in exchange for his statement. Furthermore, Swiger did not inquire as to any possible benefit he would receive for cooperating with the investigating officers and making his confession." *Stevens*, 29 P.3d at 316 (footnote and internal citation omitted).

[12] "[T]he absence of an express promise of leniency to [a declarant] does not enhance his statements' reliability to the level necessary for their untested admission." *Lilly*, 527 U.S. at 139, 119

S.Ct. 1887. "The police need not tell a person who is in custody that his statements may gain him leniency in order for the suspect to surmise that speaking up, and particularly placing blame on his cohorts, may inure to his advantage." *Id.* In *Brown*, we interpreted *Lilly* to mean that "the absence of an offer of leniency" was not a "relevant indici[um] of reliability." 381 F.3d at 1227 n. 6. In the instant case, the state court did not treat the absence of any offers of leniency as dispositive, but it apparently considered the factor when it assessed Mr. Swiger's statement for reliability. Because *Lilly* established that the absence of an offer of leniency does not enhance the reliability of the declarant's statement, here too the state court's reasoning was contrary to Supreme Court precedent.

5. *Conclusion*

[13] In sum, the Colorado Supreme Court's reasoning was contrary to Supreme Court precedent because it considered the "genuinely self-inculpatory" nature of Mr. Swiger's statement as the most important factor in the reliability assessment, *Stevens*, 29 P.3d 305, and because it also considered other trial evidence, the voluntary nature of the statement, and the absence of a promise of leniency. Accordingly, the state court "applie[d] a rule that contradicts the governing law set forth in [Supreme Court] cases," *Williams*, 529 U.S. at 405, 120 S.Ct. 1495, and AEDPA deference does not apply. *See Brown*, 381 F.3d at 1225.

IV. DE NOVO REVIEW

[14] Having concluded that the Colorado court's

calculus improperly relied on factors condemned by Supreme Court precedent, we must now review de novo the admission of Mr. Swiger's statements without cross-examination. *See* Fulcher, 444 F.3d at 806; *Brown*, 381 F.3d at 1225. We consider (1) the text of Mr. Swiger's two-and-a-half hour interview and accompanying written confession, and (2) the setting of the confession--who was present, where and when it was made, and other circumstances that may have affected Mr. Swiger's responses. *See* Lilly, 527 U.S. at 139, 119 S.Ct. 1887. "[W]e presume the factual findings of the state court and the federal district court are correct unless clearly erroneous." *Brown*, 381 F.3d at 1227 (internal quotation marks omitted).

[15] We are confident that the cumulative impact of several factors related to Mr. Swiger's custodial confession precludes a finding of sufficient reliability. First, and perhaps most importantly, Mr. Swiger provided his confession to police detectives during a custodial interrogation.

We recognize that Mr. Swiger was not in custody for the Colorado murder; he was in a Tennessee jail on an unrelated charge. Nonetheless, Mr. Swiger still had reason to believe he was being investigated for Mr. Seiler's death. *See, e.g.*, Swiger Tr. at 71 ("I'd already got word 'way y'all were comin' here, that y'all had a tape.").

Courts have long recognized that an accomplice's confession in police custody "is presumptively

unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another." *Lee*, 476 U.S. at 545, 106 S.Ct. 2056. In *Lilly*, Chief Justice Rehnquist noted the Supreme Court's "unbroken line of cases in which custodial confessions laying blame on a codefendant have been found to violate the Confrontation Clause." 527 U.S. at 147, 119 S.Ct. 1887 (Rehnquist, C.J., concurring in the judgment) (internal quotation marks omitted). This case fits within that category. *Cf. United States v. Franklin*, 415 F.3d 537, 548 (6th Cir.2005) (affirming the district court's admission of an accomplice's self-inculpatory hearsay statement, made "not to investigators but to his close friend," that equally inculpated the defendant); *United States v. Manfre*, 368 F.3d 832, 842 (8th Cir.2004) (affirming the district court's admission of an untested hearsay statement made "casually to an intimate confidante in a setting that does not raise the same concern as *Lilly* ").

Second, as Justice Bender's dissent explained, Mr. Swiger consistently described Mr. Stevens as the planner of the murder who also gave him the murder weapon and helped him to dispose of it. While Mr. Swiger eventually confessed to shooting the victim, he sought to minimize his role in several ways: (1) by repeatedly telling detectives that he was drunk on the evening of the murder and had taken drugs the previous day; (2) by claiming before his confession that he only helped Mr. Stevens to dispose of a gun; (3) by stating after the confession that he had to

carry out the murder because Mr. Stevens would otherwise kill his family and him; and (4) by saying that he tried to shoot the victim without killing him. [FN3] *Stevens*, 29 P.3d at 328 (Bender, J., dissenting).

FN3. Mr. Swiger's efforts to shift or spread responsibility for the murder apparently were effective to some degree. In his separate trial, he was acquitted of first-degree murder.

Third, while the detectives did not expressly offer a "deal" or leniency to Mr. Swiger for his confession, the detectives implied to Mr. Swiger, and he appeared to believe, that his girlfriend would not be prosecuted and his family would be getting protection as a result of the statement. When the detectives asked Mr. Swiger to confirm that they had not offered any deals for his statement, Mr. Swiger stated "No, sir, jus' that ... if I told the truth, my family'd be protected." Swiger Tr. at 72.
Fourth, Mr. Swiger exculpated himself (and inculpated Mr. Stevens and "Mike") during the first two-thirds of the statement. These portions of the statement were certainly not declarations against Mr. Swiger's penal interest. We agree with the state court that the level of detail in Mr. Swiger's statement may be a factor in support of reliability, but we also recognize that some of his detailed responses were flatly false. For example, Mr. Swiger claimed that Ms. Clontz went to a liquor store on the night of the murder, but such stores in Colorado would have been closed on a Sunday evening. *See* Colo. Stat. § 12- 47-901(5)(b)(II). Before his

confession, Mr. Swiger also described in some detail that "Mike" from Oklahoma had shot the victim. [2]

Fifth, detectives routinely asked leading questions during Mr. Swiger's custodial interrogation. At one point soon before the confession, Detective Petrucelli asked Mr. Swiger a 500-word "question" reminding him how (a) a "tough Dreamer, not the family Dreamer" may have "come[ ] out and go[ne] and commit[ed] the murder," (b) he needed to be honest with his family and himself about the murder so that he could get help; and (c) "[his] past is bitin' [him] right in the butt" because "people tell on people." Swiger Tr. at 58-59. At the end of the "question," the detective said that Mr. Stevens and his two associates "should not get away with *any* of this what they made you do." *Id.* at 59. "They shouldn't," Mr. Swiger responded. *Id.; see* Lee, 476 U.S. at 544, 106 S.Ct. 2056 (concluding that a statement against penal interest was unreliable in part because it was unsworn, "given in response to questions of police who ... knew what they were looking for," and not subjected to cross-examination). In sum, we cannot conclude that the reliability of Mr. Swiger's statement is so apparent from the record that cross-examination at Mr. Stevens's trial would have been only of "marginal utility," *Wright*, 497 U.S. at 820, 110 S.Ct. 3139. Both parties agree that Mr. Swiger's untested custodial statement does not fall within a firmly rooted exception to the hearsay rule. We now hold that the statement does

not bear particularized guarantees of trustworthiness to rebut the presumption of unreliability. Therefore, the statement's admission at Mr. Stevens's trial violated his Sixth Amendment rights to confront the witnesses against him. [FN4]

FN4. Although we do not apply the Supreme Court's decision in *Crawford* here, *see Brown*, 381 F.3d at 1225-27, we note that the Court's reasoning in that case also supports Mr. Stevens's Confrontation Clause claim. In particular, the *Crawford* Court observed that several lower courts had applied the two-part *Roberts* test "to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." 541 U.S. at 63, 124 S.Ct. 1354. *Crawford* included the Colorado Supreme Court's *Stevens* opinion in a seemingly disapproving string citation of cases that had admitted "custodial confessions implicating the accused." *Id.*

D. *Review for harmlessness*

Mr. Stevens is not entitled to habeas relief unless the Confrontation Clause error arising from the Colorado court's admission of Mr. Swiger's untested statement "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (internal quotation marks omitted). However, we need not determine whether this error "resulted in actual prejudice," *id.* at 637, 113 S.Ct. 1710, because the State concedes that, if we conclude there was Sixth Amendment error, such error would not be harmless. We appreciate the

State's professional and responsible acknowledgment that the accomplice confession provided the only direct evidence of Mr. Stevens's involvement in the murder.

V. CONCLUSION

Accordingly, we REVERSE the district court's denial of Mr. Stevens's 28 U.S.C. § 2254 petition for habeas relief, and we REMAND to the district court for entry of the writ.

C.A.10 (Colo.),2006.
Stevens v. Ortiz
465 F.3d 1229

Briefs and Other Related Documents **(Back to top)**

- 2005 WL 3077293 (Appellate Brief) Appellant's Opening Brief (Aug. 18, 2005)
- 05-1250 (Docket) (May 26, 2005)

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Civil Action No. 03-RB-533 (BNB)

DAVID P. STEVENS,

Petitioner,

v.

JOSEPH ORTIZ, Director, Colorado Department of Corrections, RICK SOARES, Warden, and. KEN SALAZAR, the Attorney General of the State of Colorado,

Respondents.

ORDER DENYING APPLICATION FOR WRIT OF HABEAS CORPUS

Blackburn, J.

This matter is before me on the applicant's Application for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 [# 1], filed March 27, 2003. The respondent has filed an answer. The applicant has filed a traverse, a supplemental brief, and a

statement of supplemental authority. I have reviewed both the record in this case and the applicable. law. For the reasons discussed below, I conclude that the applicant is not entitled to the relief he seeks.

I. JURISDICTION

I have jurisdiction over this matter under 28 U.S.C. § 2254(a).

II. FACTS

On June 21, 1996, a jury found applicant David Stevens guilty of first-degree murder after deliberation, conspiracy to commit first-degree murder, and solicitation to commit first-degree murder. Stevens was sentenced to life imprisonment on the first-degree murder conviction, plus two twenty-four year terms on the conspiracy and solicitation convictions. These sentences were ordered to run concurrently.

Stevens' convictions arose from the murder of David Seiler, who was shot and killed on the night of February 28, 1993. Seiler was shot in front of Stevens' house, where Seiler had bee visiting Stevens and others. The evidence admitted at Stevens' trial included a tape recorded and transcribed statement made to police by John Swiger. In his statement, Swiger said Stevens had hired Swiger to kill Seiler. Swiger said he was the person who shot Seiler on February 28, 1993. Swiger said Stevens had threatened to kill Swiger and Swiger's family if Swiger did not kill Seiler.

Stevens raises one issue in his application. He claims that his convictions were obtained in violation of his Sixth Amendment right to confront the witnesses against him. Stevens argues that the trial court improperly admitted Swiger's statement as evidence at Stevens' trial. Swiger did not testify at

Stevens' trial because Swiger asserted his Fifth Amendment right against self-incrimination. Swiger, therefore, never was subject to cross-examination concerning his statement. Stevens says Swiger's statement was the only evidence directly connecting Stevens to Seiler's death.

Some detail concerning the events surrounding Seiler's murder are necessary to understand the context in which Swiger made his statement to police. The Aurora, Colorado, police investigated Seiler's murder, but were not immediately able to make a case against any suspect. Swiger was interviewed by police as part of the initial investigation of Seiler's death. Swiger lived in Aurora at the time of Seiler's death, and had been spending time with Seiler, Stevens, and others prior to Seiler's death. A short time after the murder, Swiger moved to Tennessee with his

girlfriend, Bonnie Clontz.

About two years later, Detective Petrucelli of the Aurora Police Department learned from law enforcement officers in Tennessee that Swiger had been boasting to friends about killing Seiler. In January, 1995, Detectives Petrucelli and Rodriguez of the Aurora Police Department visited Swiger in the Carter County, Tennessee, jail, and interviewed him for more than two hours. The transcript of the interview is 73 pages long. *People's Answer Brief,* Appendix 1 (Swiger Trans.). At the time, Swiger was being held on unrelated criminal charges.

During most of the interview, Swiger denied any responsibility for Seiler's death, but he said he knew about some relevant, related events. Swiger said that he was invited to Stevens' house soon after he first met Stevens and his friends. Swiger said that he went to Stevens' house and, while there,

Stevens and two other people told him that Seiler had stolen drugs from Stevens, that they had beaten Seiler in retaliation, and they were afraid Seiler was going to testify against them in a criminal proceeding based on this incident. *Swiger Trans.* pp. 11-12. Stevens then asked Swiger to kill Seiler, offering to pay him 10,000 dollars. *Id.* at *12.* Swiger said he told the group he needed time to think about the offer. According to Swiger, Stevens and the other two men present then threatened to kill Swiger and his family. *Id.* p. *14.* Swiger said this meeting took occurred a day or two before Seiler was killed. *Id.* at 16.

Swiger said that a couple of days after this conversation, Stevens called Swiger and asked him to come over. Swiger went to Stevens' house where Stevens showed Swiger a .38 caliber pistol, placed the pistol in a pan of liquid that Stevens said

contained acid, and then removed the gun. *Id.* at 19. Swiger said that he and Stevens then dumped the pistol in a stream near the Denver County Jail. *Id.* at *19-20.* Asked who killed Seiler, Swiger said he was told that "some guy by the name of Mike" had killed Seiler. *Id.* at 29-30.

Swiger also described his actions on the night of Seiler's murder. He said that he was at home with his girlfriend, Bonnie Clontz, watching movies with their kids. *Id.* at 32-33. He said Clontz was with him the entire evening, except when she made a short trip to the liquor store. *Id.* at 32. Swiger recalled that either Stevens or one of his friends had called Swiger that night and asked if Swiger wanted to come over to Stevens' house. *Id.* at 43. Swiger said he declined because he was home with his kids. *Id.*

After discussing these events for some time, Swiger admitted that he shot Seiler. *Swiger Trans.*

pp. 61 - *71.* Swiger said he believed Stevens' threats against Swiger and his family, and that those threats were the reason he shot Seiler. Both Stevens and Swiger were charged in connection with Seiler's death, and they were tried separately. Before Stevens' trial, the prosecution told the court that Swiger was unavailable to testify because he had asserted his Fifth Amendment privilege against self-incrimination. Stevens objected to the use of Swiger's statement at Stevens' trial, arguing that the admission of Swiger's statement without permitting Stevens an opportunity to cross-examine Swiger would violate Stevens' rights under the Confrontation Clause of the Fifth Amendment. Swiger's statement was admitted as evidence at Stevens' trial. Stevens was convicted of first-degree murder after deliberation, conspiracy to commit first-degree murder, and solicitation to commit first-

degree murder.

Stevens appealed his conviction to the Colorado Court of Appeals, arguing that the introduction of Swiger's statement violated his confrontation rights because Swiger's statement did not contain sufficient indicia of reliability to satisfy the Confrontation Clause. The Colorado Court of appeals affirmed Stevens' conviction. **People v. Stevens,** No. 96CA1685 (Colo Ct. App. November 19, 1998) (Answer, Exhibit C). The Colorado Supreme Court affirmed. **Stevens v. People,** 29 P.3d 305 (Colo. 2001). The Colorado Supreme Court held that Swiger's statement did not fall within a firmly rooted exception to the hearsay rule, but held that it was admissible because it contained sufficient indicia of reliability. ***Id.*** at 308. Stevens petitioned for a writ of certiorari in the United States Supreme Court, and that petition was denied on April 1, 2002.

III. EXHAUSTION & TIMELINESS OF PETITION

Generally, exhaustion of available and adequate state court remedies is a prerequisite to a habeas corpus petition in federal court. ***Granberry v. Greer,*** 481 U.S. 129 (1987); ***Rose v. Lundy,*** 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). State remedies are not deemed exhausted until the highest state appellate courts have had an opportunity to consider the merits of the claim which the petitioner seeks to present in federal court. ***See Pitchess v. Davis,*** 421 U.S. 482 (1975). The respondents concede that Stevens properly exhausted his Confrontation Clause claim by raising it as a federal constitutional claim on direct appeal. Further, the respondents concede that Stevens' application was filed within the applicable one year statute of limitations. 28 U.S.C. § 2244(d)(1). I agree that the record indicates

that Stevens has exhausted his state remedies, and his application was timely filed.

IV. STANDARD OF REVIEW

The provisions of 28 U.S.C. § 2254, as amended by the Antiterrorism and effective Death Penalty Act of 1966 (AEDPA), govern Stevens' petition. Section 2254(d) establishes a standard of habeas review known as AEDPA deference. ***See, e.g., Brown v. Uphoff,*** 381 F.3d 1219, 1223 (10th Cir. 2004). Under this standard, habeas corpus relief may not be granted on a claim adjudicated on the merits in state court proceedings unless the state court adjudication: 1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or 2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence

presented in the state court proceeding. 28 U.S.C. § 2254(d).

A state court decision is contrary to clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently on. a set of materially indistinguishable facts. ***Penry v. Johnson,*** 532 U.S. 782, 792-93 (2001). A habeas petitioner challenging a state court's ruling must show that the state court's decision was objectively unreasonable, not merely erroneous, incorrect, or contrary to what a federal court might decide on direct appeal. ***See Bell v. Cone,*** 535 U.S. 685, 694 (2002); ***Williams v. Taylor,*** 529 U.S. 362, 410-11 (2000). The applicable clearly established law is based on "Supreme Court precedent as it existed when the state court reached its decision." ***Brown,*** 381 F.3d at 1224 n. 4. The

"clearly established" phrase of § 2254(d)(1) "refers to the holdings, as opposed to the dicta, of (the Supreme) Court's decisions as of the time of the relevant state-court decision." ***Williams,*** 529 U.S. at 412.

Stevens argues that the Colorado Supreme Court's decision in his case was incorrect, in light of the U.S. Supreme Court's recent opinion in ***Crawford v. Washington,*** 541 U.S. 36 (2004). ***Crawford*** was decided after the Colorado Supreme Court considered Stevens' case. As discussed below, ***Crawford*** does not apply retroactively. Even if ***Crawford*** does not apply retroactively, Stevens argues that the Colorado Supreme Court's decision was contrary to standards established by the U.S. Supreme Court in ***Ohio v. Roberts,*** 448 U.S. *56* (1980), ***Lilly v. Virginia***, *527* U.S. 116 (1999), and related cases, or involved an unreasonable application

of those standards. The respondents argue that the Colorado Supreme Court's decision in Stevens' case is not contrary to, or an unreasonable application of, the standards established in ***Roberts, Lilly,*** and related cases.

V. CONFRONTATION CLAUSE STANDARDS ESTABLISHED BY THE SUPREME COURT

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." In ***Ohio v. Roberts,*** the Supreme Court held that the Confrontation Clause does not bar the admission of an unavailable witness's statement against a criminal defendant if the statement bears adequate indicia of reliability. 448 U.S. *56, 66* (1980). The ***Roberts*** Court held that a hearsay statement may be admitted as evidence against a criminal

defendant, without cross-examination, when 1) "the evidence falls within a firmly rooted hearsay exception," or 2) the evidence has "particularized guarantees of trustworthiness." ***Id.*** I will refer to the second part of the ***Roberts*** standard as the "residual admissibility test." ***See Lilly,*** *527* U.S. at *135.*

An accomplice confession that incriminates a defendant generally does not fall within a firmly rooted hearsay exception. ***See, e.g., Lee v. Illinois,*** *476 U.S. 530,* 541 n. *5 (1986);* ***Lilly v. Virginia,*** *527 U.S.* 116, 130-31 (1999) (plurality opinion). In ***Lee v. Illinois,*** the Court said that it "has spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminated defendants." 476 U.S. 530, 544 (1986). However, the ***Lee*** court noted that this presumption can be rebutted if the statement "is supported by a 'showing

of particularized guarantees of trustworthiness." ***Id.*** at 543 (citing ***Roberts,*** 448 U.S. at 66). Cases subsequent to ***Roberts*** discussed a variety of factors that may be considered in determining whether an accomplice confession that incriminates a defendant has sufficient guarantees of trustworthiness to be admitted without violation of the defendant's confrontation rights.

However, the Court has declined "to endorse a mechanical test for determining 'particularized guarantees of trustworthiness' under the Clause." ***Idaho v. Wright,*** 497 U.S. 805, 822 (1990) (concerning testimony of child declarant). In ***Wright,*** the Court said that "courts have considerable leeway in their consideration of appropriate factors." ***Id.***

Lilly v. Virginia - In ***Lilly v. Virginia,*** the Court concluded that the admission of an accomplice's statement against defendant Lilly, without

confrontation, violated Lilly's Confrontation Clause rights. All of the Justices concurred in the judgment, but various justices adopted significantly different rationales. A four Justice plurality reexamined the factors that may be considered in determining whether an accomplice confession that implicates a defendant may be admitted into evidence because it bears particularized guarantees of trustworthiness. 527 U.S. 116, 135 - 39 (1999). The ***Lilly*** plurality noted that the Court previously had "rejected the notion that 'evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears 'particularized guarantees of trustworthiness.'" 527 U.S. at 137-38 (citing ***Idaho v. Wright,*** *497* U.S. 805, 822 (1990)). Rather, hearsay evidence used to convict a defendant must "possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence

at trial." ***Id.*** **at 138** (quoting ***Wright,*** 497 U.S. at 822). The ***Lilly*** plurality also noted that the voluntariness of an accomplice's confession does not bear on a determination of its trustworthiness, and that a declarant's awareness of his Miranda rights does not bear on the reliability of his statement. ***Id.*** at 138 ***(citing Lee v. Illinois,*** *476* U.S. 530, 544 (1986)).

The fact that a statement is against the declarant's penal interest sometimes is cited as a factor indicating that the statement is reliable. ***Williamson v. U.S.,*** *512 U.S.* 594, 605 (1994) (that a statement is genuinely self-inculpatory is one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under Confrontation Clause; applying Fed. R. Evid. 804(b)(3)) (citing ***Lee v. Illinois,*** 476 U.S. 530, 544 (1986)). The ***Lilly*** plurality noted that such

statements "are suspect insofar as they inculpate other persons. '[T]hat a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts." ***Id.*** at 139 (quoting ***Williamson,*** 512 U.S. at 599 (applying Fed. R. Evid. 804(b)(3)). The ***Lilly*** plurality noted Justice Blackmun's observation that "accomplice confessions ordinarily are untrustworthy precisely because they are not unambiguously adverse to the penal interest of the declarant," but instead are likely to be attempts to minimize the declarant's culpability. ***Lilly,*** 527 U.S. at 132 (quoting ***Lee v. Illinois,*** 476 U.S. at 552-553 (Blackmun, J., dissenting)).

Crawford v. Washington - The law established in ***Ohio v. Roberts*** and its progeny was changed substantially when the Court announced its opinion in ***Crawford v. Washington,*** 541 U.S. 36

(2004). In ***Crawford,*** the court held that when "testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." 541 U.S. 36,_____, 124 S.Ct. 1354, 1374. The Court also held that the ***Roberts*** reliability analysis cannot be used to justify the admission of testimonial hearsay that has not been subjected to cross-examination. *Id.* at _____, 124 S.Ct. at 1373 - 74.

The ***Crawford*** Court concluded that the ***Roberts*** reliability "framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations." 541 U.S. at _____, 124 S.Ct. at 1371.

> The unpardonable vice of the ***Roberts*** test, however, is not its unpredictability, but its demonstrated capacity to admit

> core testimonial statements that the Confrontation Clause plainly meant to exclude. Despite the plurality's speculation in ***Lilly*** that it was "highly unlikely" that accomplice confessions implicating the accused could. survive ***Roberts,*** courts continue routinely to admit them.

Id. at 1371 (citations omitted). Reliability in this context is "an amorphous, if not entirely subjective, concept." ***Id.*** "Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords to each of them." ***Id***. The Court noted various groups of factors considered by a variety of state and federal courts, including the factors cited by the Colorado Supreme Court in ***People v. Stevens***, 29 P.3d 305 (Colo. 2001), and noted that "(s)ome courts wind up attaching the same significance to opposite facts." ***Crawford,*** 541 U.S. at 1371. After ***Crawford,*** testimonial hearsay that implicates a defendant,

including statements made during police questioning, is not admissible unless the defendant has had an adequate opportunity for cross examination.

VI. CLEARLY ESTABLISHED LAW

To apply the standard mandated by 28 U.S.C. § 2254(d), I must determine the contours of the relevant clearly established law based on Supreme Court precedent as it existed when the Colorado Supreme Court issued its opinion in ***People v. Stevens,*** 29 P.3d 305 (Colo. 2001). I conclude that ***Crawford*** is not applicable retroactively, and that ***Lilly*** cannot be read as having created new, clearly established law.

In ***Brown v. Uphoff,*** the Tenth Circuit held that the ***Crawford*** decision is not applicable retroactively. 381 F.3d 1219, 1227 (10th Cir. 2004). ***Crawford*** was

decided after the Colorado Supreme Court issued its opinion in Stevens' case. ***Crawford*** *is* not part of the relevant U.S. Supreme Court precedent that existed when the Colorado Supreme Court reached its decision in ***Stevens.***

The primary opinion in ***Lilly*** *is* a plurality opinion fully supported by four Justices. The plurality opinion is divided into six sections designated by Roman numerals. In Section IV, the plurality discussed whether the statement in question amounted to a statement against penal interest admissible under a firmly rooted hearsay exception. 527 U.S. at 125-34. The Court also discussed various types of statements against penal interest, and noted that the court had "spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants." ***Id.*** at 131 ***(citing Lee v. Illinois,*** 476

U.S. 530, 541 (1986)). In Section V, the ***Lilly*** plurality discussed the factors that properly may be considered in determining if such a statement bears particularized guarantees of trustworthiness sufficient to satisfy the ***Roberts*** residual admissibility test. ***Id***. at 135 - 40. Stevens relies primarily on these two sections of the ***Lilly*** opinion to support his argument that the Colorado Supreme Court's decision in ***Stevens*** *is* contrary to clearly established law as determined by the U.S. Supreme Court.

I conclude that the standards first stated in the ***Lilly*** plurality opinion do not constitute clearly established law as determined by the U.S. Supreme Court. Again, § 2254(d)(1)'s "clearly established" phrase "refers to the holdings, as opposed to the dicta, of (the Supreme) Court's decisions as of the time of the relevant state-court decision." ***Williams***

v. Taylor, 529 U.S. 362, 412 (2000). The ***Lilly*** plurality reached some conclusions that were not clearly established by other U.S. Supreme Court authority. Notably, the ***Lilly*** plurality concluded that "the absence of an express promise of leniency . . . does not enhance (a declarant's) statements' reliability to the level necessary for their untested admission." ***Lilly,*** 527 U.S. at 139. This conclusion is stated in Section IV of the plurality opinion. Justice Scalia concurred with Parts I, II, and VI of the plurality opinion. 527 U.S. at 143. Presaging ***Crawford,*** Justice Scalia concluded that admission of the accomplice statement against Lilly without cross examination constituted a "paradigmatic Confrontation Clause violation." 527 U.S. at 143. Stevens reads Justice Scalia's concurrence as a fifth vote for the plurality's discussion of the factors relevant to a reliability analysis, and the plurality's

rejection of certain factors. If the ***Lilly*** plurality's analysis of the relevant factors was supported by the votes of five Justices, then that analysis should be viewed as law clearly established by the U.S. Supreme Court.

I do not agree that Justice Scalia's concurrence should be viewed as a fifth vote for the ***Lilly*** plurality's analysis of the relevant reliability factors. Although Justice Scalia agreed with the result suggested by the ***Lilly*** plurality, he did not join in those portions of the plurality opinion that discussed factors relevant to a ***Roberts*** reliability analysis. Justice Scalia did not join in Section V of the ***Lilly*** plurality's opinion, the section in which the plurality analyzed the reliability factors. Justice Scalia's opinion, therefore, cannot be seen as a fifth vote for the reliability analysis advanced by the ***Lilly*** plurality.

It must be noted, finally, that ***Lilly*** discusses several previous Supreme Court opinions that are relevant to the ***Roberts*** reliability analysis. To the extent those other opinions create relevant clearly established law, those opinions must be considered in applying the § 2254(d) standard of review. The ***Lilly*** plurality's description of this previously established law is instructive.

VII. RELIABILITY FACTORS CITED BY THE COLORADO SUPREME COURT

In its opinion in ***People v. Stevens,*** the Colorado Supreme Court outlined several factors that it considered to be relevant to an assessment of the trustworthiness of Swiger's statement. These factors include: (1) whether the statement was truly self-inculpatory; (2) whether the statement was made while Swiger was in custody, (3) whether Swiger was subjected to leading questions; (4)

whether Swiger's statement was detailed; (5) whether the details could be confirmed independently; (6) whether police officers threatened or coerced Swiger to make the statement; (7) whether the statement was offered in exchange for leniency; (8) whether Swiger had a reason to retaliate against the Stevens; and (9) whether Swiger was mentally or physically unstable at the time of the confession. ***Stevens,*** 29 P.3d 305, 314-18.

Stevens argues that, in assessing reliability, the Colorado Supreme Court improperly assessed the role of six of these factors. First, Stevens argues that the Colorado Supreme Court improperly assessed the self-inculpatory nature of Swiger's statement as an indicator of the statement's reliability. Second, Stevens says the court improperly discounted the fact that Swiger was in custody when

he made his statement. Third, Stevens argues that Swiger was subjected to leading questions by the interrogating officers, detracting from the reliability of the statement. Fourth, Stevens says Swiger was given implicit promises of leniency by the interrogating officers, and those promises tend to minimize the reliability of Swiger's statement. Fifth, Stevens argues that the court improperty considered the voluntariness of Swiger's statement. Sixth, Stevens claims the court improperly considered evidence that corroborated Swiger's statement.

A. Self-Inculpatory Statement –The ***Stevens*** court noted the self-inculpatory nature of Swiger's statement as a factor indicating that Swiger's statement was reliable, and noted that this factor is the "most important" factor in determining a statement's trustworthiness. ***Stevens,*** 29 P.3d at 314. The court also noted that this factor alone is not

sufficient to satisfy the residual admissibility test.

> We stress, however, that an evaluation as to whether a statement is genuinely self-inculpatory is only one of the factors to be analyzed and is not by itself dispositive. In this case, Swiger admitted in his confession that he alone shot and killed the victim. He did not minimize his involvement in the murder nor did he shift the responsibility for committing the murder to the defendant.
>
> Swiger's statements inculpating the defendant are closely intertwined with the self-inculpatory portions of his confession. His description of the defendant's involvement in the murder provided the police investigators with Swiger's motive for killing the victim and explained how Swiger carried out the murder. In addition, Swiger's explanation of how he and the defendant discussed and planned the murder not only inculpated the defendant, it also augmented his own guilt by showing that the murder was premeditated. This dual inculpation distinguishes cases in which the parts of an accomplice's statement inculpating the defendant do not also inculpate the accomplice but rather tend to exculpate the accomplice by shifting the majority of the blame to the defendant.

Stevens, 29 P.3d at 315. In short, the ***Stevens*** court concluded that Swiger's statement was self-inculpatory even when the statement also implicated Stevens in the murder.

Stevens argues that the Colorado Supreme Court's reliance on Swiger's self-incrimination was misplaced. He argues that, even after Swiger confessed to pulling the trigger, Swiger "continued to shift primary responsibility for Seiler's death to Mr. Stevens, and to spread the blame among others ...." *Traverse,* p. 27. This blame shifting, Stevens argues, makes the self-incriminating aspects of Swiger's statement insignificant as a factor that tends to overcome the presumptive unreliability of such a statement.

Again, the U.S. Supreme Court has noted that "the very fact that a statement is genuinely self-

inculpatory ... is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause." ***Williamson v. U.S.,*** 512 U.S. 594, 605 (1994) (applying Fed. R. Evid. 804(b)(3)) (citing ***Lee v. Illinois,*** 476 U.S. 530, 544 (1986)). The *Lilly* plurality summarized the law in this area as follows:

> In ***Lee,*** we reaffirmed ***Douglas [v. Alabama,*** 380 U.S. 415(1965)] and explained that its holding "was premised on the basic understanding that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." 476 U.S. at 541. This is so because "the] truth finding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination. ... 'Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are

> less credible than ordinary hearsay evidence.' " ***Ibid.*** (quoting ***Bouton*** [***v. U.S.***], 391 U.S. [123], at 141 (White, J., dissenting)). Indeed, even the dissenting Justices in ***Lee*** agreed that "accomplice confessions ordinarily are untrustworthy precisely because they are not unambiguously adverse to the penal interest of the declarant," but instead are likely to be attempts to minimize the declarant's culpability. 476 U.S. at **552-553** (Blackmun, J., dissenting).
>
> We have adhered to this approach in construing the Federal Rules of Evidence. Thus, in ***Williamson v. United States,*** 512 U.S. 594 (1994), without reaching the Confrontation Clause issue, we held that an accomplice's statement against his own penal interest was not admissible against the defendant. We once again noted the presumptive unreliability of the "non-self-inculpatory" portions of the statement: "One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature." ***Id.,*** at 599-601.

Lilly, 527 U.S. at 132 (footnotes omitted).

Considering the content and circumstances of Swiger's statement, it is difficult to see how Swiger

stood to gain anything by inculpating Stevens. To the extent Swiger inculpated Stevens, Swiger also was inculpating himself. The ***Stevens*** court noted that the only way Swiger's statement minimized Swiger's culpability was his claim that he could not withdraw from his agreement to kill Seiler because he believed Stevens would harm Swiger's family if Swiger withdrew. The court noted that this statement may be designed to invoke sympathy, but it "does not diminish the fact that [Swiger] was soley responsible, without any coercion on the day in question, for driving to the defendant's house and murdering the victim." ***Stevens,*** *29* P.3d at 315. Further, the ***Stevens*** court noted that nothing in the record suggests that Swiger thought his claim of coercion would exonerate him. ***Id.*** Rather, Swiger indicated that he understood that his confession would cause him to spend the rest of his life in jail.

Id.

In short, Swiger's statement is unambiguously adverse to his penal interest. The portions of the statement that inculpate Stevens also inculpate Swiger. Swiger began his statement by describing events that incupated Stevens, but not Swiger. In the end, however, Swiger confessed that he, Swiger, shot Seiler. Although Swiger's statement does inculpate Stevens, nothing in Swiger's statement serves to shift primary responsibility for Seiler's murder to Stevens. To the extent any part of Swiger's confession can be seen as non-self-inculpatory, those parts are extremely minimal and do not constitute a significant effort to shift or spread blame to Stevens. As the ***Stevens*** court noted, this dual inculpation distinguishes this case from cases, like ***Lilly***, "in which the parts of an accomplice's statement inculpating the defendant do

not also inculpate the accomplice but rather tend to exculpate the accomplice by shifting the majority of the blame to the defendant." ***Stevens,*** 29 P.3d at 315. The Colorado Supreme Court's consideration of the self-inculpatory nature of Swiger's statement as a factor indicating that the statement bore particularized guarantees of trustworthiness was not contrary to clearly established federal law, as determined by the Supreme Court of the United States.

B. Statement Made In Custody & Leading Questions - Stevens argues that the reliability of Swiger's statement is undermined because the statement was made while Swiger was in custody, and because Swiger was responding to leading questions from detectives. These two factors are relevant considerations because a person who is in custody, and who is prompted with leading

questions, may answer in a way that will please his interrogators, even though the answers are not accurate.

Swiger was interrogated while he was in custody on charges not related to Seiler's murder. However, he was aware that he was being questioned about Seiler's murder. The ***Stevens*** court noted that when a suspect is in custody for his obvious involvement in serious crimes, the suspect's knowledge that anything he says may be used against him militates against depending on his veracity. ***Stevens,*** 29 P.3d at 316 (citing ***Lilly***, 527 U.S. at 138). The ***Stevens*** court distinguished Swiger's situation because Swiger was questioned two years after Seiler's murder, and Swiger had not been questioned about the murder since he first was questioned immediately after the crime. Unlike the situation in ***Lilly***, Swiger was not told that police

had strong evidence linking Swiger to the murder. Rather, Swiger was told only that witnesses in Tennessee had reported that they had heard Swiger bragging about his involvement in the murder. The fact that Swiger was in custody does not enhance the reliability under the applicable standards but, under the circumstances of this case, is does not substantially detract from the reliability calculus either.

Initially, Swiger was not asked leading questions. In the latter half of the interview, Swiger's questioners asked him some leading questions. *See, e.g., Swiger Trans.* pp. 44-45, 48, 52, 58-59. Stevens particularly notes the question on pages 58-59 of the transcript in which a detective paints a scenario in which Swiger might have killed Seiler. Much, but not all, of the scenario described in this question is based on facts revealed by Swiger

earlier in the interview. About two pages later, Swiger began to say that he was the person who shot Seiler.

The ***Stevens*** court acknowledged the leading questions Swiger was asked, but concluded that Swiger was no coerced by these questions. ***Stevens,*** 29 P.3d at 316. The court noted that Swiger first made statements about his involvement in the murder to friends in Tennessee, not to investigators. ***Id.*** Swiger's initial statements were not made under the pressure of police interrogation, including leading questioning. His confession to investigating officers was consistent with these statements. I disagree with Stevens' statement that Swiger was responding "primarily" to leading questions. *Traverse,* p. 28. Rather, the interviewing officers posed some leading questions, but generally sought to prompt Swiger to tell his own version of events.

Considering Swiger's statement as a whole, and the circumstances of the statement, I find that the leading questions asked by investigators did not substantially detract from the reliability of Swiger's statement.

C. Absence of an Offer of Leniency - As noted above, the ***Lilly*** plurality concluded that the absence of an express promise of leniency does not enhance a statement's reliability to the level necessary to permit its untested admission. 527 U.S. at 139. The plurality did not cite authority for this statement. As discussed above, the conclusion of the ***Lilly*** plurality alone does not establish this proposition as clearly established law. Stevens cites no U.S. Supreme Court authority, other than ***Lilly***, for the proposition that consideration of this factor is improper. The Colorado Supreme Court noted that the "police officers interviewing Swiger expressly

informed him on several occasions that he would not receive any deals in exchange for his statement." ***Stevens,*** 29 P.3d at 316. As of the date of the Colorado Supreme Court's opinion, reliance on this factor was not contrary to clearly established federal law, as determined by the Supreme Court of the United States.

Stevens says Swiger implicitly was offered leniency, and that this offer undermines the reliability of his statement. For example, one officer said that the only way Swiger could help himself was to tell the story so that his accomplices would not get away with what they had done, and an officer said to Swiger "[y]ou'd probably help yourself if you told us the truth." *Swiger Trans.* pp. 45, 58-59. To the extent such statements can be read as offers of leniency, I conclude that they do not significantly undermine the reliability of Swiger's statement

under the applicable standards. Swiger repeatedly indicated that he understood the severity of the consequences if he confessed to killing Seiler, and the cited statements by the interviewing officers do not serve to minimize those consequences. Opining that Swiger's accomplices should not get away with something does not tend to minimize the consequences to Swiger. Shortly after this statement was made, Swiger again noted that he would spend the rest of his life in prison. *Swiger Trans.* p. 60. The Colorado Supreme Court properly considered the absence of offers of leniency as a factor in its reliability analysis.

D. Voluntariness of the Statement - The Colorado Supreme Court noted in ***Stevens*** that Swiger "was not coerced and no improper tactics were used" when Swiger was being questioned. **Stevens,** 29 P.3d 316. "From the record there is no reason to

believe that Swiger's statement was anything but voluntary." ***Id.*** Stevens argues that the Colorado Supreme Court's reliance on the absence of threats or coercion constitutes an improper reliance on the voluntariness of Swiger's statement as an indicator of reliability.

In ***Lee v. Illinois,*** the U.S. Supreme Court said that the fact that a statement is voluntary, for Fifth Amendment purposes, "does not bear on the question of whether the confession was also free from any desire, motive, or impulse" by the declarant to mitigate his culpability, to spread blame to others, or to overstate the involvement of others. 476 U.S. 530, 544 (1986). The Tenth Circuit has concluded that the U.S. Supreme Court's opinion in ***Lee*** unequivocally indicates that reliance on the voluntariness of as statement as an indicator of reliability is inappropriate. ***Brown v. Uphoff,*** 381 F.3d 1219,

1225 (10th Cir. 2004). As of the date of the Colorado Supreme Court's opinion in ***Stevens***, reliance on the voluntariness of Swiger's statement in assessing the trustworthiness of that statement was contrary to clearly established federal law, as determined by the Supreme Court of the United States in ***Lee.***

E. Level of Detail and Corroborating Evidence - The ***Stevens*** court noted that other courts have considered "whether a statement is highly detailed when determining its admissibility under the Confrontation Clause." ***Stevens***, 29 P.3d 317. The court then noted that Swiger provided in his statement "many details concerning the murder and the defendant's participation that could be independently confirmed." ***Id.*** The court then reviewed the many details Swiger provided, and how those details were consistent with the rest of the story Swiger provided. ***Id.***

Stevens does not cite a U.S. Supreme Court case that holds that reliance on the level of detail of an accomplice's statement is prohibited when determining if the statement has particularized guarantees of trustworthiness. In ***Earnest v. Dorsey,*** the Tenth Circuit considered the level of detail in a statement to be a relevant factor in determining particularized guarantees of trustworthiness. 87 F.3d 1123, 1135 (10th Cir. 1996). At the time of the ***Stevens*** opinion, consideration of the level of detail in a statement was appropriate under applicable case law.

Stevens also argues that the Colorado Supreme Court improperly relied on corroborating evidence as part of its reliance on the level of detail in Swiger's statement. *Petitioner's Supplemental Authority,* filed September 20, 2004, p. 2. The U.S. Supreme Court has clearly established that

corroborating evidence is not a proper consideration when determining if a hearsay statement has particularized guarantees of trustworthiness. ***Idaho v. Wright,*** 497 U.S. 805, 822 (1990). The ***Stevens*** court's statement that the details in Swiger's statement could be "independently confirmed" indicates that the court relied on corroborating evidence in is analysis. ***Stevens,*** 29 P.3d at 317.

Having reviewed the record, I conclude that there was not significant corroborative evidence concerning Swiger's explanation of the reasons Stevens would believe that Swiger would be willing to commit the murder, how Stevens supplied Swiger with a gun, how the gun later was dipped in acid, or how an associate of Stevens had called Swiger to alert Swiger to an opportunity to shoot Seiler. Each of these points constitute details provided by Swiger which were not supported by corroborating evidence.

On the other hand, Swiger's statements concerning Steven's motive for killing Seiler, how Seiler had been kidnaped and beaten by Stevens, how Stevens had helped to dispose of the murder weapon, and Swiger's position and actions at the time of the shooting all may have been supported by corroborative evidence. In this context, the fact that Swiger provided these details should not be considered as indicating that Swiger's statement was reliable.

I note also that the level of detail in Swiger's statement also tends to indicate that his statement is reliable in a different way. As Stevens notes, Swiger denied any involvement in actually shooting Seiler for much of the time in which he was talking to the Aurora detectives. During this time, however, Swiger provided a variety of details concerning the events leading up to and following Seiler's death.

When Swiger changed his story, and admitted that he shot Seiler, Swiger did not alter his statement concerning the events leading up to and following Seiler's death. Except for his involvement in actually shooting at Seiler, Swiger's story remained consistent throughout the interview. Even when Swiger changed his story about actually shooting Seiler, the details he had provided concerning related events remained consistent. This consistency tends to indicate that his statement is reliable.

The Colorado Supreme Court's reliance on corroborative evidence in its reliability analysis was contrary to clearly established law as established by the United States Supreme Court in ***Idaho v. Wright,*** *497* U.S. *805, 822 (1990). To* the extent details provided by Swiger could be confirmed by corroborating evidence, those details should be excluded from the reliability analysis.

F. Conclusion - The Colorado Supreme Court 's reliance on the voluntariness of Swiger's statement in assessing the trustworthiness of that statement was contrary to clearly established federal law, as determined by the Supreme Court of the United States in ***Lee v. Illinois,*** *476* U.S. *530, 541* (1986). The Colorado Supreme Court's consideration of evidence that corroborated the details provided by Swiger in his statement was contrary to clearly established federal law, as determined by the Supreme Court of the Untied States in ***Idaho v. Wright,*** *497* U.S. *805, 822* (1990). The Colorado Supreme Court's consideration of the other factors discussed in its opinion in ***People v. Stevens,*** *29* P.3d 305 (Colo. *2001),* was not contrary to clearly established federal law, as determined by the Supreme Court of the United States.

IIX. *DE NOVO* DETERMINATION OF

CONFRONTATION CLAUSE ISSUE

If a state court adjudication was contrary to clearly established law, as determined by the United States Supreme Court, AEDPA deference does not apply. ***Brown v. Uphoff,*** 381 F.3d 1219, 1225 (10th Cir. 2004). The Colorado Supreme Court violated clearly established law when it considered the voluntariness of Swiger's statement and corroborating evidence in assessing the trustworthiness of that statement. Therefore, I must determine, de novo, if a violation of the Confrontation Clause occurred because these improper factor were considered. ***Id.*** I must determine if the state court should have felt compelled to conclude that the admission of Swiger's statement violated Stevens' confrontation clause rights, applying case law as it existed prior to Stevens' conviction. ***Id.*** at *1227* n. *6.*

Brown concerned a Confrontation Clause issue similar to the issue in this case. The ***Brown*** court concluded that the Wyoming Supreme Court improperly relied on two factors in assessing the trustworthiness of an accomplice's statement under ***Roberts*** and related cases. Those two factors were 1) the voluntariness of the accomplice's statement; and 2) evidence corroborating the statement. ***Id.*** at 1225.

> By relying on these factors the Wyoming Supreme Court arrived at a conclusion 'diametrically different' from Supreme Court precedent. ***Williams,*** 529 U.S. at 406, 120 S.Ct. 1495. Accordingly, we conclude that the state court acted contrary to clearly established federal law.

Id.

The court then undertook a *de novo* review of the Confrontation Clause issue. The court noted its opinion in ***Earnest v. Dorsey,*** 87 F.3d 1123 (10'" Cir. 1996), which also reviewed a Confrontation

Clause issue. The ***Earnest*** court concluded that the state court had relied on corroborating evidence as a factor supporting the reliability of testimonial hearsay. ***Id.*** at 1132. However, the court concluded that the statement was sufficiently reliable to avoid a Confrontation Clause violation even if consideration of corroborating evidence was excluded from the analysis. The ***Earnest*** court noted that "the self-inculpatory nature of the statement, the level of detail concerning the crime, and the absence of any offer of leniency to the co-defendant making the statement" all supported the conclusion that the statement was sufficiently trustworthy to satisfy the Confrontation Clause. ***Id.*** at 1133.

The same three factors were present in ***Brown.*** 381 F.3d at 1228. "Guided by ***Earnest,*** we must conclude that under the applicable law at the time of the Wyoming Supreme Court's decision the

admission of Vena's statements was not error." ***Id.*** at 1227 - 28. In other words, excluding the two factors improperly considered by the Wyoming Supreme Court, the ***Brown*** court concluded that the accomplice statement in question still satisfied the ***Roberts*** "residual admissibility test" under the law in effect when the Wyoming Supreme Court ruled on the issue.

The Tenth Circuit noted in ***Brown*** that the U.S. Supreme Court's decision in ***Lilly*** was issued after Brown's conviction became final. ***Id.*** at 1228 n. 6. The Tenth Circuit concluded that *Lilly* was not applicable retroactively, and did not define the clearly established law applicable to Brown. ***Id.*** Stevens notes that his conviction became final after ***Lilly***. Stevens argues that the Colorado Supreme Court's ruling in his case violated law established by ***Lilly***. *As* discussed in Section VI, above, I conclude

that Sections IV and V of the plurality opinion in ***Lilly*** did not create new law applicable to this case. The Confrontation Clause law established by the U.S. Supreme Court prior to ***Lilly*** was established before Brown's conviction was final, and was controlling in ***Brown.*** Thus, the analysis undertaken by the Tenth Circuit in ***Brown,*** which excluded consideration of ***Lilly*** as clearly established law, also is applicable in this case.

In determining whether Swiger's statement satisfied the ***Roberts*** "residual admissibility test," the Colorado Supreme Court properly considered and applied the following seven factors: (1) whether the statement was truly self-inculpatory; (2) whether the statement was detailed, excluding the consideration of corroborating evidence; (3) whether the confession was offered in exchange for leniency; (4) whether the declarant was likely to have

personal knowledge of the events in the statement; (6) whether the declarant had a reason to retaliate against the defendant; and (7) whether the declarant was mentally or physically unstable at the time of the confession. Again, the Colorado Supreme Court improperly considered both the voluntariness of Swiger's statement, and the existence of evidence that corroborated details provided by Swiger. These two factors have been excluded from my *de novo* review of the Confrontation Clause issue.

In ***Brown,*** the court concluded that three factors, the self-inculpatory nature of the statement, the level of detail concerning the crime, and the absence of any offer of leniency to the co-defendant making the statement, were sufficient to satisfy the ***Roberts*** "residual admissibility test" under the applicable law. Each of these factors was considered by the Colorado Supreme Court in Stevens' case as

well. However, in considering the level of detail in Swiger's statement, those details that could be confirmed by corroborating evidence should be excluded from the reliability calculus. In addition, the Colorado Supreme Court properly considered three additional factors: (1) whether the declarant was likely to have personal knowledge of the events in the statement; (2) whether the declarant had a reason to retaliate against the defendant; and (3) whether the declarant was mentally or physically unstable at the time of the confession.

Each of these six factors properly supported the Colorado Supreme Court's conclusion that Swiger's statement satisfied the ***Roberts*** "residual admissibility test" under the applicable law. Having carefully considered the record in this case, including the content and circumstances of Swiger's statement, and following the Tenth Circuit's analysis

in ***Brown,*** I must conclude that the admission of Swiger's statement based on the analysis adopted by the Colorado Supreme Court did not violate Stevens' Confrontation Clause rights under the law applicable at the time of the Colorado Supreme Court's ruling.

IX. CONCLUSION ORDERS

The Colorado Supreme Court's ruling in ***People v. Stevens,*** 29 P.3d 305 (Colo. 2001), was contrary to clearly established federal law, as determined by the United States Supreme Court, to the extent the Colorado Supreme Court relied on the voluntariness of Swiger's statement and the existence of corroborating evidence as factors supporting the court's finding that Swiger's statement bore sufficient particularized guarantees of trustworthiness. On *de novo* review of the Confrontation Clause issue, however, I conclude that

the admission of Swiger's statement at Stevens' trial did not constitute a violation of Stevens' Confrontation Clause rights under the law applicable at the time of the **Colorado** Supreme Court's ruling.

THEREFORE IT IS ORDERED as follows:

1) That the applicant's Application for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 [# 1], filed March 27, 2003, is **DENIED;** and

2) That this case is **DISMISSED.**

Dated May 5, 2005, at Denver, Colorado.

BY THE COURT:

_____

Robert E. Blackburn
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF SERVICE

Civil Case No. 03-RB-0533 (PAC)

The undersigned certifies that a copy of the

foregoing _____was served _____on,

2005, by:

(X) delivery to:

Magistrate Judge Patricia A. Coan

Madeline S. Cohen, Esq. Assistant Federal Public Defender

Laurie A. Booras, Esq.
First Assistant Attorney General Appellate Division
Criminal Division
DC Box 20

O by electronic mail to the addressed to:

(X) depositing the same in the United States Mail, postage prepaid, addressed to:

_____
Deputy Clerk

APPENDIX C

29 P.3d 305

Briefs and Other Related Documents

Supreme Court of Colorado,
En Banc.
David P. STEVENS, Petitioner,
v.
The PEOPLE of the State of Colorado, Respondent.
No. 99SC121.
June 25, 2001.
Rehearing Denied Aug. 27, 2001.

Defendant was convicted of first-degree murder, conspiracy to commit first-degree murder, and solicitation to commit first-degree murder. Defendant appealed. The Court of Appeals affirmed. Certiorari was granted. The Supreme Court, Mullarkey, C.J., held that: (1) accomplice's confession met the requirements for the hearsay exception for declarations against penal interest by an unavailable witness; (2) the hearsay exception for declarations against penal interest by an unavailable witness was not a "firmly rooted hearsay exception," as basis for admission under Confrontation Clause without an additional showing of sufficient guarantees of trustworthiness, with respect to declarations of a co-defendant made during custodial interrogation; and (3) the accomplice's confession had sufficient guarantees of trustworthiness.
Affirmed.

Bender, J., filed an opinion concurring in part and dissenting in part, in which Martinez, J., joined.

West Headnotes

[1] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k416 Declarations by Third Persons
110k417 In General
110k417(15) k. Self-Incriminating or Exculpating Declarations. Most Cited Cases

Witness who refused to testify at defendant's murder trial, asserting his Fifth Amendment privilege against self-incrimination, was an "unavailable witness," within the meaning of hearsay exception for declarations against penal interest by an unavailable witness. U.S.C.A. Const.Amend. 5; Rules of Evid., Rule 804(b)(3).

[2] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k416 Declarations by Third Persons
110k417 In General
110k417(15) k. Self-Incriminating or Exculpating Declarations. Most Cited Cases

Witness' admission that he murdered the victim after being solicited to do so by the defendant was a "declaration against penal interest," within meaning of hearsay exception for declarations against penal interest by an unavailable witness; witness exposed himself to liability for murdering the victim. Rules of Evid., Rule 804(b)(3).

[3] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.8 k. Out-Of-Court Statements and Hearsay in General. Most Cited Cases

Although an out-of-court statement may be admissible because it falls within an exception to the hearsay rule, the statement nevertheless must be excluded at a criminal trial if admitting it into evidence would deprive the defendant of his constitutional right to be confronted with the witnesses against him. U.S.C.A. Const.Amend. 6; Rules of Evid., Rule 804.

[4] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence

110k662 Right of Accused to Confront Witnesses

110k662.8 k. Out-Of-Court Statements and Hearsay in General. Most Cited Cases

The Confrontation Clause permits the admission of hearsay evidence only where the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility. U.S.C.A. Const.Amend. 6; Rules of Evid., Rule 802.

[5] KeyCite Notes

110 Criminal Law

110XX Trial

110XX(C) Reception of Evidence

110k662 Right of Accused to Confront Witnesses

110k662.8 k. Out-Of-Court Statements and Hearsay in General. Most Cited Cases

Hearsay declarations offered against a defendant in a criminal prosecution are admissible, under the Confrontation Clause, only if the prosecution demonstrates that the declarant is unavailable to testify and the declarations either fall within a firmly rooted hearsay exception or bear particularized guarantees of trustworthiness. U.S.C.A. Const.Amend. 6; Rules of Evid., Rule 804.

[6] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.8 k. Out-Of-Court Statements and Hearsay in General. Most Cited Cases

The hearsay exception for declarations against interest by an unavailable witness is not a "firmly rooted hearsay exception," as basis for admission under Confrontation Clause without an additional showing of sufficient guarantees of trustworthiness, with respect to declarations of a co-defendant made during custodial interrogation. U.S.C.A. Const.Amend. 6; Rules of Evid., Rule 804(b)(3).

[7] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.10 k. Confessions or Declarations of Codefendants. Most Cited Cases

An accomplice's or co-defendant's custodial confession, which incriminates the defendant, is to be viewed with suspicion and considered presumptively untrustworthy, for purposes of defendant's right to confront witnesses; the

accomplice or co-defendant has a powerful motivation to exonerate himself and implicate the defendant. U.S.C.A. Const.Amend. 6.

[8] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.10 k. Confessions or Declarations of Codefendants. Most Cited Cases

The presumptive unreliability of a co-defendant's confession during custodial interrogation, so that the Confrontation Clause would not permit admission of the confession, under a hearsay exception, in a prosecution of defendant, may be rebutted if the co-defendant's statement is genuinely self-inculpatory and is supported by guarantees of trustworthiness. U.S.C.A. Const.Amend. 6; Rules of Evid., Rule 804.

[9] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.10 k. Confessions or Declarations of Codefendants. Most Cited Cases

Admission, under hearsay exception for declarations against penal interest by an unavailable witness, of accomplice's confession to police that he murdered the victim after being solicited to do so by defendant did not violate defendant's right to confront witnesses, where there were sufficient guarantees of trustworthiness; confession was genuinely self-inculpatory, it was not designed to shift blame to defendant or to curry favor with law enforcement officials, it provided many details concerning the murder and defendant's participation that could be independently confirmed, the murder investigation had been inactive, accomplice was not in police custody, and accomplice knew that defendant and defendant's associates had history of retaliating if crossed. U.S.C.A. Const.Amend. 6; Rules of Evid., Rule 804(b)(3).

[10] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.10 k. Confessions or Declarations of Codefendants. Most Cited Cases

To determine whether an accomplice's confession, inculpating the defendant, bears sufficient guarantees of trustworthiness so that admission of the confession under a hearsay exception does not

violate defendant's right to confront witnesses, the court looks to the totality of the circumstances surrounding the making of the statement. U.S.C.A. Const.Amend. 6; Rules of Evid., Rule 804(b)(3).

[11] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.10 k. Confessions or Declarations of Codefendants. Most Cited Cases

To satisfy constitutional standards under the Confrontation Clause and to rebut the presumption of unreliability of a co-defendant's confession during custodial interrogation, such hearsay evidence must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial. U.S.C.A. Const.Amend. 6; Rules of Evid., Rule 804.

[12] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.10 k. Confessions or Declarations of

Codefendants. Most Cited Cases

Courts have considerable leeway in their consideration of appropriate factors for determining whether an accomplice's confession, inculpating the defendant, bears sufficient guarantees of trustworthiness so that admission of the confession under a hearsay exception does not violate defendant's right to confront witnesses. U.S.C.A. Const.Amend. 6; Rules of Evid., Rule 804.

[13] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.8 k. Out-Of-Court Statements and Hearsay in General. Most Cited Cases

The analysis of whether a hearsay statement is sufficiently reliable to be admissible under the Confrontation Clause is distinct from the analysis for admissibility of evidence under the hearsay exception for declarations against interest by an unavailable witness. U.S.C.A. Const.Amend. 6; Rules of Evid., Rule 804(b)(3).

[14] KeyCite Notes

110 Criminal Law

110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.10 k. Confessions or Declarations of Codefendants. Most Cited Cases

When evaluating an accomplice's confession, the most important determination as to its trustworthiness, for purposes of determining whether admission of the confession violates defendant's Confrontation Clause rights, is whether the statement at issue is genuinely self-inculpatory or whether it shifts the blame from the accomplice to the defendant. U.S.C.A. Const.Amend. 6.

[15] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.10 k. Confessions or Declarations of Codefendants. Most Cited Cases

An evaluation as to whether an accomplice's statement is genuinely self-inculpatory, for purposes of determining whether the statement has sufficient trustworthiness so that its admission does not violate defendant's right to confront witnesses, is only one of the factors to be analyzed and is not by itself dispositive. U.S.C.A. Const.Amend. 6.

[16] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.10 k. Confessions or Declarations of Codefendants. Most Cited Cases

The critical consideration when using detail as a basis for inferring the trustworthiness of an accomplice's statement, for purposes of determining whether admission of the statement violates defendant's Confrontation Clause rights, is the likelihood that the declarant could have fabricated the details without having witnessed them firsthand. U.S.C.A. Const.Amend. 6.

[17] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.10 k. Confessions or Declarations of Codefendants. Most Cited Cases

When considering detail, for purposes of determining whether admission of the accomplice's statement

violates defendant's Confrontation Clause rights, a court must look for indicia of trustworthiness regarding the reliability of the substance of the statement, with the major focus on the parts of the statement recounting the defendant's involvement. U.S.C.A. Const.Amend. 6.
***308**

David Kaplan, Colorado State Public Defender, Pamela A. Dayton, Deputy State Public Defender, Denver, CO, Attorneys for Petitioner.
Ken Salazar, Attorney General, Barbara McDonnell, Chief Deputy Attorney General, Alan J. Gilbert, Solicitor General, Robert Mark Russel, First Assistant Attorney General, Jerry N. Jones, Special Assistant Attorney General, Appellate Division, Denver, CO, Attorneys for Respondent.

Chief Justice MULLARKEY delivered the Opinion of the Court.
In this murder-for-hire case, the defendant, David Stevens, was convicted of first-degree murder, conspiracy to commit first-degree murder, and solicitation to commit first-degree murder, in connection with the February 28, 1993, shooting death of David Seiler. [FN1] The prosecution's theory was that the defendant engaged John Swiger to kill the victim in order to prevent the victim from testifying against the defendant in an upcoming criminal trial scheduled for April 1993. In that trial, the same defendant, Stevens, was charged with

kidnapping and severely beating the same victim, Seiler, in the late evening hours of December 31, 1991, and the early morning hours of January 1, 1992, some thirteen months before the victim was murdered. Following the victim's death but before the defendant was charged in connection with his murder, the defendant was tried and convicted of the kidnapping and assault charges. He was sentenced to imprisonment for life plus eighty years. For his convictions in connection with the murder case now before us, the defendant received a life sentence and two concurrent terms of twenty-four years each to be served consecutively with his previous sentences.

FN1. Stevens was convicted of: (1) first-degree murder under section 18-3-102, 6 C.R.S. (2000); (2) conspiracy to commit first-degree murder under section 18-2-201, 6 C.R.S. (2000); and (3) solicitation to commit first-degree murder under section 18-2-301, 6 C.R.S. (2000).

We granted certiorari to determine whether the court of appeals applied a proper Confrontation Clause analysis when it upheld the admission into evidence of the shooter Swiger's confession in Stevens's trial. [FN2] The court of appeals determined that Swiger's confession was a statement against interest that was inherently trustworthy because it was supported by the following indicia of reliability: (1) the statement was strongly against Swiger's penal interest; (2) the statement was made after Swiger voluntarily waived his Miranda rights; (3) Swiger was not offered any favorable treatment in exchange for making the statement; and (4) the

statement contained such detail as to suggest that Swiger had personal knowledge of the crime. *People v. Stevens,* No. 96CA1685, slip op. at 5-7 (Colo.App. Nov. 19, 1998) (not selected for official publication). We conclude that the appellate court did not err. Swiger's statement was admissible because it contained sufficient guarantees of trustworthiness.

FN2. We granted certiorari on the following issue:

(1) Whether the court of appeals erred in conducting its Confrontation Clause analysis.

I.

At the time of the crimes, the defendant Stevens was a man in his mid-forties who operated an illegal drug business from his Aurora home and recruited numerous individuals to assist him in his drug operations. Some, like the victim Seiler and his girlfriend, were young people in their teens or early twenties; the victim was twenty years old when he died. Other participants were adults in their thirties who, like the shooter Swiger and his girlfriend, claimed to have ties to motorcycle gangs. The defendant's home was the focus of activities related to the illegal drug trade, such as repackaging drugs for resale, and also was a place for socializing among people involved in the defendant's illicit business. The chain of events that culminated in the victim's death began in December 1991 when the defendant's home was burglarized and drugs and money were stolen. The defendant, believing that the victim was responsible for the theft, arranged to have the victim

kidnapped. On December 31, 1991, the defendant
309

and two companions held the victim at gunpoint for several hours in the defendant's house. The three severely beat the victim while they interrogated him about the burglary.

In response to questioning by the defendant, the victim listed several people who he said were responsible for stealing the defendant's drugs and property. At some point during the assault, the defendant and the victim both spoke by telephone to three teenage girls who the victim claimed were involved in the burglary of the defendant's house. The defendant informed the girls that he would kill the victim if they did not help him find his drugs. One of the girls, however, called the police who rescued the victim and arrested the defendant. The defendant subsequently was charged with several crimes related to this incident.

In the weeks immediately following the abduction and beating, the victim withdrew from contact with the defendant. Over time, however, the victim and his girlfriend were drawn into the defendant's activities. In fact, in the month preceding his death, the victim and his girlfriend visited the defendant's house on a daily basis. The victim frequently said that he intended to lie at defendant's pending trial on the kidnapping and assault charges and that he would deny that the defendant had harmed him. The defendant appeared to have reconciled with the victim and was described as treating him like a son.

Throughout this time period, however, the defendant contacted different people in an effort to find someone who would kill the victim prior to the kidnapping and assault trial. Two of these individuals testified at the trial in this case. One testified that he refused the defendant's request to kill the victim.

The second man, Jeff Cayouette, testified under a grant of immunity that he had agreed to murder the victim in exchange for a vintage motorcycle. According to Cayouette, the defendant supplied him with a loaded handgun to commit the crime. In October 1992, after receiving the gun, Cayouette asked the victim to come along with him to buy some drugs. He then drove the victim to a suburban residential area. Cayouette parked in the residential area and talked with the victim for over an hour as they waited to meet their drug contact. While they were waiting, Cayouette asked the victim to help him check his car's fan belt. When the victim got out of the car to look under the hood, Cayouette pulled out a gun and shot at him three times. All three shots missed, however, and the victim was able to run away. The victim escaped to a nearby house and telephoned the police, who later found shell casings and other evidence supporting his report of the shooting attempt. No charges were filed in the incident.

The gunman in this case, John Swiger, knew the victim through the defendant's drug operation for about one month before the murder occurred. Swiger told the defendant and his associates that he was an enforcer for a motorcycle gang. At trial, Swiger's girlfriend testified to overhearing conversations

between the defendant and Swiger in which the two men agreed that Swiger would commit the murder. The defendant allegedly promised to pay Swiger $5000 before and $5000 after the murder took place but it is not clear from the record how much money, if any, changed hands. In his statement admitted into evidence at the trial, Swiger claimed that he was compelled to follow through with the murder because he feared that otherwise the defendant would harm his girlfriend and her children. At other times, however, Swiger claimed to have committed the murder as an act of friendship to help the defendant.

According to Swiger, the defendant provided him with a handgun to use as the murder weapon. After the crime, the defendant dipped the gun in acid and helped Swiger dispose of it by throwing it into a stream. Following the explicit directions given by Swiger, the police recovered the gun. Ballistic tests confirmed that it was the murder weapon and it was placed into evidence at trial.

On the day of the murder, one of the defendant's close associates, Corey Ivey, took the victim, his girlfriend, and a sixteen-year ***310**

old girl, Tina Parks, out to dinner. Ivey drove the victim, his girlfriend and Parks to dinner in the defendant's truck. Later the same evening, the two couples returned to the defendant's house. The defendant was at home sleeping on the living room couch when they arrived. The defendant purportedly had injured his back and was taking muscle-relaxing

drugs that made him drowsy. It was the prosecution's theory that the defendant feigned the injury to provide himself with an alibi for the time when the planned murder occurred. Shortly after the two couples entered the house, the defendant went to sleep in a bedroom and was asleep when the murder was committed.

The murder plan, as arranged by the defendant, required Ivey to send the victim on an errand in the defendant's truck and to notify Swiger when the victim was about to leave so that Swiger could drive to the defendant's house and shoot the victim. Swiger lived just over a mile from the defendant's home. The murder occurred as planned except that Parks accompanied the victim on the errand. Shortly after the two walked out of the front door, Swiger fired two shots, killing the victim instantly. Parks was very close to the path of the gunshots but apparently did not see the shooter. She immediately returned to the house and informed the others about the shooting. Subsequently the police were called and they commenced their investigation.

Shortly after the murder, the police interviewed Swiger and his girlfriend, both of whom denied any involvement in the crime. The couple informed the police that they intended to return to Tennessee with their children and Parks, the only witness to the murder. Soon after the police interview, they moved to Tennessee as planned.

The police investigation of the murder stalled and no charges were filed. In January 1994, the defendant was convicted of kidnapping and assaulting the victim in the 1992 New Year's Eve abduction. The murder case, however, remained unresolved for

another year. The investigation was reactivated only after Tennessee law enforcement officials notified Colorado officials of reports that Swiger had been bragging about committing a murder in Colorado. This information led two Aurora police officers to travel to Tennessee to interview Swiger, who was being held on robbery and attempted murder charges in an unrelated crime.

Swiger was advised of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), prior to being interviewed by the officers. During the course of the interview, Swiger admitted that he murdered the victim after being solicited to do so by the defendant. The interview was recorded on audiotape and was also transcribed. In addition, Swiger wrote and signed a short confession. At the defendant's trial, the tape recording was played for the jury although it is not in the record on appeal. The transcript of the interview and the written statement also were admitted into evidence. It is the admission of this evidence (collectively referred to as Swiger's statement) that is at issue in the case now before us.

II.

[1] [2] We agree with the court of appeals' conclusion that Swiger's statement falls within the exception to the hearsay rule for declarations against penal interest by an unavailable witness. *See* CRE 804(b)(3). [FN3] Swiger refused to testify at trial, asserting his Fifth Amendment privilege against self-incrimination, and as such was an unavailable witness. *See Lee v. Illinois*, 476 U.S. 530, 549-50, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986). Also,

by making the statement, Swiger clearly exposed himself to liability for murdering the victim. Therefore, we address our review to the court of appeals' analysis of whether the admission of Swiger's statement violated the defendant's rights under the Confrontation ***311***

Clause of the Sixth Amendment to the United States Constitution. [FN4]

FN3. CRE 804(b)(3) defines a statement against interest as follows:

A statement which ... at the time of its making ... so far tended to subject [the declarant] to ... criminal liability ... that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal
liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

FN4. The defendant premised his argument on his Sixth Amendment right under the United States Constitution "to be confronted with the witnesses against him."

III.

[3] [4] [5] Although an out-of-court statement may be admissible because it falls within an exception to the hearsay rule, the statement nevertheless must be excluded at a criminal trial if admitting it into evidence would deprive the defendant of his constitutional right to be confronted with the witnesses against him. U.S. Const. amend VI; *People v. Newton*, 966 P.2d 563, 572-73 (Colo.1998); *Blecha v. People*, 962 P.2d 931, 941 (Colo.1998); *see also Dutton v. Evans*, 400 U.S. 74, 80-82, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970); *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) (applying the Sixth Amendment right to confront witnesses to state criminal prosecutions). The Confrontation Clause only permits the admission of hearsay evidence where " 'the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility.' " *Lilly v. Virginia*, 527 U.S. 116, 136, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) (quoting *Idaho v. Wright*, 497 U.S. 805, 820, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990)). To meet this requirement, out-of-court declarations offered against a defendant in a criminal prosecution are admissible only if the prosecution demonstrates that the declarant is unavailable to testify and the declarations either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." [FN5] *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) (creating the two-part test for determining whether a hearsay statement is considered sufficiently dependable to be admitted

into evidence without the rigorous testing of cross-examination); *see also* Newton, 966 P.2d at 574 n. 13; *Blecha*, 962 P.2d at 941.

FN5. Statements that fall within a firmly rooted hearsay exception are considered to be trustworthy such that cross-examination would not add to their reliability. *Idaho v. Wright*, 497 U.S. 805, 820-21, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

It is undisputed that at the defendant's trial Swiger, having declared his intent to exercise his constitutional right against self-incrimination, was unavailable to testify for purposes of our Confrontation Clause analysis. The People argue that Swiger's statement was admissible because it fell within a firmly rooted exception to the hearsay rule, namely the exception for declarations against interest by an unavailable witness. *See* CRE 804(b)(3). Under the facts of this case, we reject that contention. We then examine the second prong of the *Roberts* test and find that the statement is admissible because it has adequate guarantees of trustworthiness.

A.

[6] Our previous case law has implied that Colorado's hearsay exception for statements against interest by an unavailable witness is not firmly rooted. *Newton*, 966 P.2d at 574 n. 13 (Colo.1998); *see also People v. Drake*, 785 P.2d 1253, 1256 (Colo.1989) (requiring independent evidence to show that a statement against interest that inculpated the

accused was reliable, thereby implicitly recognizing that CRE 804(b)(3) is not a firmly rooted exception to the hearsay rule); *People v. Fincham*, 799 P.2d 419, 422 (Colo.App.1990) ("While it is true that reliability *may* be inferred where the evidence falls within a firmly rooted exception, a declaration against penal interest is too large a class for meaningful Confrontation Clause analysis.") (citation omitted). Notwithstanding these cases, the People argue that the Supreme Court has left open the possibility that the hearsay exception for declarations against interest by an unavailable witness may be considered a firmly rooted hearsay exception when the statement at issue is "genuinely self-inculpatory." *Lilly*, 527 U.S. at 146, 119 S.Ct. 1887 (Rehnquist, C.J., concurring).

In *Lilly*, the defendant, Benjamin Lilly ("Benjamin"), went on a crime spree with his brother Mark Lilly ("Mark") and Mark's roommate. *Lilly*, 527 U.S. at 120, 119 S.Ct. 1887. Over the course of two days, the trio committed a string of robberies and thefts. ***312**

Id. When their car broke down, the three men stole a car and abducted and murdered the car's owner. *Id.* After the three men were taken into custody, Mark made a statement to the police in which he confessed to being involved in several of the minor thefts. *Id.* at 121, 119 S.Ct. 1887. Nevertheless, he maintained that he took no part in the more serious thefts or the murder. *Id.* Mark also stressed that he was drunk during the entire crime spree. *Id.* Police officers informed Mark that he faced a life sentence unless

he broke "family ties." *Id.* In response, Mark acknowledged that he would be sent to the penitentiary for his involvement in the crime spree, however, he informed the officers that it was his brother Benjamin who committed the more serious crimes including the murder. *Id.*

At Benjamin's subsequent trial for capital murder, Mark exercised his Fifth Amendment right against self-incrimination and declined to testify. *Id.* Over Benjamin's objections, the trial court admitted into evidence an audio recording of Mark's statement. *Id.* at 122, 119 S.Ct. 1887. The court ruled the recording was admissible under the exception to Virginia's hearsay rule for declarations against interest made by an unavailable witness. *Id.* at 121-22, 119 S.Ct. 1887. The Supreme Court of Virginia upheld Benjamin's conviction, finding that Mark's statement was a statement against interest by an unavailable witness and therefore fell within Virginia's declaration-against-interest exception to the hearsay rule. *Id.* at 122, 119 S.Ct. 1887. The court also held that Virginia's declaration-against-interest hearsay exception was a firmly rooted hearsay exception so that the admission of a statement against interest would not violate the Confrontation Clause. *Id.*

In a plurality decision, the Supreme Court reversed the judgment and remanded the case for a new trial. *Id.* at 140, 119 S.Ct. 1887. The court noted that statements falling within a hearsay exception are admissible only if the hearsay exception at issue is a firmly rooted exception or if the statement is supported by adequate guarantees of trustworthiness. *Id.* at 124-25, 119 S.Ct. 1887. Four

justices held that an accomplice's confession, which inculpates the criminal defendant, does not fall within a firmly rooted hearsay exception. *Id.* at 134, 119 S.Ct. 1887. (Stevens, J., delivering an opinion in which Souter, Ginsburg, and Breyer, JJ., joined). Therefore, the four justices held that the confession was inadmissible under the Confrontation Clause unless there was evidence in the record guaranteeing its trustworthiness. *Id.* The justices found that there were not adequate guarantees of trustworthiness in the record and therefore reversed the Virginia Supreme Court's decision. *Id.* at 139-40, 119 S.Ct. 1887.

Three justices found that those portions of Mark Lilly's statement that incriminated his brother were not "genuinely self-inculpatory" and would have left open the issue of whether "custodial confessions that *equally* inculpate both the declarant and the defendant" are within a firmly rooted hearsay exception. *Id.* at 146, 119 S.Ct. 1887 (Rehnquist, C.J., O'Connor, Kennedy, JJ., concurring) (emphasis added). Two justices concurred separately. Justice Scalia concluded that the introduction at trial of a tape recording of the declarant's statement, in which he stated that the defendant committed the charged murder, was a "paradigmatic Confrontation Clause violation." *Id.* at 143, 119 S.Ct. 1887 (Scalia, J., concurring). Justice Thomas agreed with Chief Justice Rehnquist, finding that "the lower courts did not analyze the confession under the second prong of the *Roberts* inquiry ... and therefore [I] see no reason for the plurality to address an issue upon which those courts did not pass." *Id.* at 143-44, 119 S.Ct. 1887 (Thomas, J., concurring) (quotations and

citation omitted).
Prior to *Lilly,* the Supreme Court held that an accomplice's statement against interest, made to a fellow inmate, inculpating a co-defendant was admissible and did not violate the Confrontation Clause. *Dutton,* 400 U.S. at 86-89, 91 S.Ct. 210. Confessions made to fellow prisoners, family members, and friends are distinguishable from custodial confessions taken by law enforcement officers with a view to prosecution. *See Lilly,* at 146-47, 119 S.Ct. 1887 (Rehnquist, C.J., concurring). Therefore, even after *Lilly,* such confessions may be considered as falling ***313**

within a firmly rooted hearsay exception. The case now before us is something of a hybrid. Swiger's original admissions were made to acquaintances but the evidence admitted at trial was his custodial confession to law enforcement personnel.
The People argue that we should follow the decision of the New Mexico Supreme Court in *State v. Gonzales,* in which the court found that a statement against interest that equally inculpated the declarant and the accused fell within a firmly rooted hearsay exception. 128 N.M. 44, 989 P.2d 419, 423-24 (1999). *Gonzales,* however, involved a statement by a co-defendant made to fellow gang members, not to the police while the declarant was in custody. 989 P.2d at 421. As discussed above, such statements against interest may be considered to come within a firmly rooted exception to the hearsay rule. *See Lilly,* 527 U.S. at 147, 119 S.Ct. 1887 (Rehnquist, C.J.,

concurring) ("[S]tatements to fellow prisoners, like confessions to family members or friends, bear sufficient indicia of reliability to be placed before a jury without confrontation of the declarant."); *cf.* *Dutton*, 400 U.S. at 87, 91 S.Ct. 210 (considering the factor that a statement against interest made to a fellow prisoner was not made in the "coercive atmosphere of official interrogation"). *Gonzales* does not address the fact situation contained in this case. Here, although Swiger came to the attention of the police because of confessions he made to acquaintances, the actual statement admitted into evidence was made by Swiger, the unavailable declarant, to police officers during custodial interrogation. Thus, the facts of this case do not fit within the narrow category of "firmly rooted" hearsay that the Supreme Court has suggested may exist for a co-defendant's out-of-court statement.

[7] The one area of agreement in *Lilly* is that custodial confessions by a co-defendant inculpating the accused are viewed with "special suspicion" because the co-defendant has a powerful motivation to exonerate himself and implicate the defendant. *Lilly*, 527 U.S. at 131-32, 146, 119 S.Ct. 1887. Indeed, the Supreme Court has consistently found that an accomplice's custodial confession, which incriminates the accused, is to be viewed with suspicion and considered presumptively untrustworthy. *Lee*, 476 U.S. at 541, 106 S.Ct. 2056; *Douglas v. Alabama*, 380 U.S. 415, 419, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); *Crawford v. United States*, 212 U.S. 183, 204, 29 S.Ct. 260, 53 L.Ed. 465 (1909); *see also* *Williamson v. United States*, 512

U.S. 594, 599-601, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994). Likewise, when considering statements against interest made by a co-defendant while in custody, this court has looked for indicia of reliability to overcome the presumptive unreliability of these statements. *Drake*, 785 P.2d at 1256. We agree that a co-defendant's statements are presumptively unreliable in these situations because of the strong interest a co-defendant has in exculpating his actions while at the same time inculpating another defendant. We also find that such statements are admissible only if they are supported by guarantees of trustworthiness. Therefore, we conclude that a statement against interest by a co-defendant made during custodial interrogation does not fall within a firmly rooted hearsay exception.

[8] Having determined that Swiger's custodial confession does not fall within a firmly rooted hearsay exception, we now must decide whether the statement has sufficient guarantees of trustworthiness to be admissible. [FN6] *Lilly*, 527 U.S. at 134, 119 S.Ct. 1887 ***314**

(finding that although an accomplice's statement inculpating the defendant is not within a deeply rooted hearsay exception such a statement may be admissible if it satisfies the second prong of the *Roberts* test). We now proceed to that next step.

FN6. The presumptive unreliability of a co-defendant's confession may be rebutted. *Lilly*, 527 U.S. at 137, 119 S.Ct. 1887; *Lee v. Illinois*, 476 U.S. 530, 543, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986). This presumption may be rebutted and the statement against interest admitted if the co-defendant's statement is genuinely self-inculpatory and is supported by guarantees of trustworthiness. *Earnest v. Dorsey*, 87 F.3d 1123, 1134 (10th Cir.1996) (finding that the admission of an accomplice's confession that was "truly self-inculpatory" did not violate the Confrontation Clause); *Gabow v. Commonwealth*, 34 S.W.3d 63, 78-79 (Ky.2000) (stating that when a statement is "truly self-inculpatory" this is a guarantee of trustworthiness); *State v. Marshall*, 136 Ohio App.3d 742, 737 N.E.2d 1005, 1009 (2000) ("A voluntary confession, not made pursuant to a deal with the prosecution, and which implicates both the accomplice and the defendant has sufficient *indicia* of reliability."); *State v. Franco*, 151 Or.App. 472, 950 P.2d 348, 353 (1997) (accomplice's confession admissible where accomplice exposed himself to equally serious criminal liability); *Brown v. State*, 953 P.2d 1170, 1179-80 (Wyo.1998) (affirming trial court's admission of portions of accomplice's statements that implicated him equally with defendant); *see also United States v. Dolah*, 245 F.3d 98, 104-05 (2d Cir.2001) (stating that the court has "regularly approved" of the admission of statements from accomplices even when the government has played a role in obtaining them); *United States v. Gomez*, 191 F.3d 1214, 1222 (10th Cir.1999).

B.

[9] [10] [11] [12] The question before us then is whether Swiger's statement bore sufficient guarantees of trustworthiness to satisfy the second prong of the *Roberts* test so that its admission does not violate the Confrontation Clause. *Lilly*, 527 U.S. at 133-34, 119 S.Ct. 1887 (finding that while accomplice confessions inculpating a defendant are presumptively unreliable, there is no "blanket ban" on such statements and they are admissible if they meet the second prong of the *Roberts* test); *United States v. Gomez*, 191 F.3d 1214, 1222 (10th Cir.1999) (stating that accomplice confessions are admissible if they have "adequate indicia of reliability"). To decide that question, we look to the totality of the circumstances surrounding the making of the statement. *Wright*, 497 U.S. at 820-21, 110 S.Ct. 3139. To satisfy constitutional standards and to rebut the presumption of unreliability, hearsay evidence must possess "indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Id.* at 822, 110 S.Ct. 3139; *Newton*, 966 P.2d at 574. However, the Supreme Court has not provided a test for determining whether guarantees of trustworthiness exist and has stated that courts have "considerable leeway in their consideration of appropriate factors." *Wright*, 497 U.S. at 822, 110 S.Ct. 3139.

[13] The analysis of whether a hearsay statement is sufficiently reliable to be admissible under the Confrontation Clause is distinct from the analysis

for admissibility of evidence under CRE 804(b)(3). *Newton*, 966 P.2d at 574; *see also Dutton*, 400 U.S. at 81-82, 91 S.Ct. 210. However, prior cases analyzing the trustworthiness of hearsay statements can provide us with guidance.

Our cases have identified several factors to consider when assessing the trustworthiness of a hearsay statement, including: the nature and character of the statement; the relationship between the parties to the statement; the declarant's probable motivations for making the statement; and the circumstances under which the statement was made. *People v. Fuller*, 788 P.2d 741, 745 (Colo.1990). We also have taken into account "where and when the statement was made, to whom the statement was made, what prompted the statement, how the statement was made, and what the statement contained." *Newton*, 966 P.2d at 576. In analyzing the trustworthiness of a hearsay statement for Confrontation Clause purposes, the Tenth Circuit has considered the following indicia of reliability: (1) whether the statement is detailed; (2) whether the statement was made voluntarily or was coerced; (3) whether the declarant was in a position to have personal knowledge of the described events in the statement; (4) whether the statement was made soon after the described events; and (5) whether the declarant had a motivation to inculpate the defendant. *Gomez*, 191 F.3d at 1222-23; *see also Earnest v. Dorsey*, 87 F.3d 1123, 1134 (10th Cir.1996) (observing that factors that support a finding of trustworthiness include: (1) whether the statement was truly inculpatory; (2) the amount of detail contained in the statement; (3) whether the

statement was made voluntarily, looking at whether law enforcement officers threatened or coerced the confession; (4) whether the confession was obtained in exchange for an offer of leniency; and (5) the mental and physical condition of the accomplice when the confession was made).

[14] [15] When evaluating an accomplice's confession, the most important determination as to its trustworthiness is whether the statement at issue is genuinely self-inculpatory or whether it shifts the blame from the confessor to the defendant. *See **315*

Lilly, 527 U.S. at 146, 119 S.Ct. 1887 (Rehnquist, C.J., concurring) (suggesting that "custodial confessions that *equally* inculpate both the declarant and the defendant" may even satisfy "a firmly rooted hearsay exception under *Roberts* ") (emphasis added); *see also* *Williamson*, 512 U.S. at 605, 114 S.Ct. 2431 ("[T]he very fact that a statement is *genuinely self-inculpatory* ... is itself *one* of the guarantees of trustworthiness that makes a statement admissible under the Confrontation Clause.") (emphasis added); *United States v. Dolah*, 245 F.3d 98, 104 (2d Cir.2001) (viewing *Lilly* as rejecting admission of an accomplice's confession only because it was largely non-self-inculpatory). We stress, however, that an evaluation as to whether a statement is genuinely self-inculpatory is only one of the factors to be analyzed and is not by itself dispositive. *See* *Williamson*, 512 U.S. at 605, 114

S.Ct. 2431.
In this case, Swiger admitted in his confession that he alone shot and killed the victim. He did not minimize his involvement in the murder nor did he shift the responsibility for committing the murder to the defendant. [FN7]

FN7. This case is clearly distinguishable from *Lilly,* where the accomplice confessed to being involved in a crime spree with his co-defendants, which included robberies and a murder, but denied any involvement in the murder, the most serious crime committed. *Lilly,* 527 U.S. at 121, 119 S.Ct. 1887. In our view, the confession in *Lilly* was not genuinely self-inculpatory. We also find that many of the cases decided after *Lilly,* which have rejected the admission of a co-defendant's confession, either involved statements that were not genuinely self-inculpatory or statements that were made in the belief that the co-defendant would receive a benefit. *See United States v. Castelan,* 219 F.3d 690, 695 (7th Cir.2000) (co-defendant asked if his assistance would help him); *Gomez,* 191 F.3d at 1223 (co-defendants informed that their cooperation would be beneficial); *State v. Sheets,* 260 Neb. 325, 618 N.W.2d 117, 124-25, 133 (2000) (co-defendant's confession inculpated defendant as the person who committed the rape and murder while co-defendant was present).

Swiger's statements inculpating the defendant are closely intertwined with the self-inculpatory portions of his confession. His description of the defendant's involvement in the murder provided the police

investigators with Swiger's motive for killing the victim and explained how Swiger carried out the murder. In addition, Swiger's explanation of how he and the defendant discussed and planned the murder not only inculpated the defendant, it also augmented his own guilt by showing that the murder was premeditated. This dual inculpation distinguishes cases in which the parts of an accomplice's statement inculpating the defendant do not also inculpate the accomplice but rather tend to exculpate the accomplice by shifting the majority of the blame to the defendant. *See, e.g.*, *Lilly*, 527 U.S. at 121, 119 S.Ct. 1887 (part of accomplice's confession inculpating the defendant served to lessen accomplice's guilt by explaining that the defendant, not the accomplice, committed the murder); *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117, 133 (2000) (accomplice acknowledged he was present during the crime but that the defendant committed the rape and murder).

The only part of Swiger's confession that in any way minimized his culpability was his naked assertion that he could not withdraw from his agreement with the defendant to murder the victim because he believed that if he did so, the defendant would harm his family. Swiger did not provide details about this alleged threat. While such an explanation may be designed to invoke sympathy, it does not diminish the fact that Swiger admitted in his statement that he was solely responsible, without any coercion on the day in question, for driving to the defendant's house and murdering the victim.

Nothing in the record suggests that Swiger thought his claim of coercion would exonerate him. In fact, it

is difficult to imagine a more genuinely self-inculpatory statement than that given by Swiger. After being read his *Miranda* rights and being expressly informed that no lenient treatment or deals would be offered, Swiger confessed to police investigators that he committed the premeditated murder of the victim.
Furthermore, the record shows that Swiger was aware that confessing to killing the victim would lead to severe consequences regardless of his motive for committing the murder. Prior to confessing, Swiger stated that his confession would lead to him spending "the rest of my life in jail." Swiger also
***316**

acknowledged that if he confessed, he would never live with his family again.
Continuing our analysis, we recognize that, as in *Lilly*, Swiger's confession was made to police officers while being interviewed and asked some leading questions. However, we find that this case is clearly distinguishable from *Lilly*. In *Lilly*, the accomplice who made the confession was in custody facing charges after being apprehended for his involvement in a crime spree. 527 U.S. at 121, 119 S.Ct. 1887. Police officers told the accomplice that he was about to be charged and that if he wanted to avoid a life sentence he had "better start talking." *Id.* The Supreme Court stated that, "[w]hen a suspect is in custody for his *obvious* involvement in serious crimes, his knowledge that anything he says may be used against him militates against depending on his

veracity." *Id.* at 138, 119 S.Ct. 1887 (emphasis added).

In this case, however, Swiger was not being held in custody in connection with the victim's murder. In fact, two years had passed since the murder, the investigation was inactive, and the police had not interviewed Swiger since his departure from Colorado a few days after the murder. To an objective observer, it would appear that Swiger successfully escaped detection for the crime by fleeing the state and taking with him the only known eyewitness to the crime. Apart from informing Swiger that witnesses had come forward stating that they had heard Swiger bragging about his involvement in a murder, the police investigators did not tell Swiger that they had any other evidence linking him to the victim's murder. Thus, this case is clearly distinguishable from *Lilly*. *See United States v. Shea*, 211 F.3d 658, 669 (1st Cir.2000) ("Lilly's main concern was with statements in which ... the declarant admits *only* what the authorities are already capable of proving against him and seeks to shift the principal blame to another.") (emphasis added). In his statement, Swiger acknowledged that prior to his arrest by Tennessee law enforcement officers he had confessed his involvement in the victim's shooting to acquaintances in Tennessee. Thus, Swiger was not being detained for his involvement in the victim's murder and did not have the same outside pressures that existed in *Lilly* to make a statement to the investigating police officers. [FN8] Whatever caused Swiger to start talking about the murder in the first place came from within himself and was not the result of government action.

FN8. In *United States v. Papajohn*, the court distinguished the case at issue from *Lilly* because the declarant was not arrested or charged with a crime prior to making his statement and therefore did not have "[t]he obvious incentive that the captured accomplice in Lilly had to shift blame." 212 F.3d 1112, 1119 (8th Cir.2000); *see also Brown v. State*, 953 P.2d 1170, 1179 (Wyo.1998) (fact that accomplice was not under arrest when he made statement and voluntarily continued to provide information after he had been given *Miranda* warnings supported a finding that the statement was trustworthy).

Although police investigators did use some leading questions in the interview, Swiger was not coerced and no improper tactics were used. From the record there is no reason to believe that Swiger's statement was anything but voluntary. The police officers interviewing Swiger expressly informed him on several occasions that he would not receive any deals in exchange for his statement. [FN9] *See Gomez*, 191 F.3d at 1223 (acknowledging that absence of an offer of leniency is an important indicator of reliability). Furthermore, Swiger did not inquire as to any possible benefit he would receive for cooperating with the investigating officers and making his confession. [FN10] ***317**

See United States v. Castelan, 219 F.3d 690, 695-96 (7th Cir.2000) (finding that custodial confession

lacked inherent guarantees of trustworthiness because declarant asked police investigators if he would benefit from his cooperation).

FN9. The lack of any offers of leniency further distinguishes this case from *Lilly,* in which the confessing accomplice was told that if he did not make a statement he would be facing life imprisonment. *Lilly,* 527 U.S. at 121, 119 S.Ct. 1887.

FN10. In the course of Swiger's confession, the investigating officers offered to protect his family from possible retaliation from the defendant. However, the record does not support an assumption that
Swiger's confession was hinged on this offer of protection, or that the offer was an incentive for inculpating the defendant. A different factual scenario was presented in *Sheets,* where the defendant was in custody for a racially motivated murder, and, as a result, was in fear for his safety while imprisoned. 618 N.W.2d at 132. In exchange for police offers of protection, the defendant in that case offered a confession inculpating a co-defendant and signed a plea bargain agreement that provided for his protection. *Id.*

[16] [17] Other courts have taken into consideration whether a statement is highly detailed when determining its admissibility under the Confrontation Clause. *Gomez,* 191 F.3d at 1222-23; *Earnest,* 87 F.3d at 1134; *Brown v. State,* 953 P.2d

1170, 1180 (Wyo.1998). The critical consideration when using detail as a basis for inferring the trustworthiness of a statement is the likelihood that the declarant could have fabricated the details without having witnessed them firsthand. *See, e.g., Dana v. Dep't of Corrections*, 958 F.2d 237, 239 (8th Cir.1992) (finding it unlikely that a four-year-old child could manufacture graphic descriptions of sexual abuse). When considering detail, a court must look for indicia of trustworthiness regarding the reliability of the substance of the statement with the major focus on the parts of the statement recounting the defendant's involvement. *See Earnest*, 87 F.3d at 1134.

Examining the record, we find that Swiger provided many details concerning the murder and the defendant's participation that could be independently confirmed. Swiger described the defendant's motive for wanting the victim dead, i.e., to prevent the victim from testifying in the upcoming trial. Although he knew the defendant for only a short time, Swiger had detailed knowledge regarding how and why the defendant had kidnapped and assaulted the victim. He explained the reasons why the defendant believed that he, Swiger, would be willing to commit the murder, i.e., Swiger's self-described role as an enforcer for a motorcycle gang. Swiger provided details about how the defendant supplied him with the loaded gun used to commit the murder. He also depicted how the defendant dipped the murder weapon in acid and helped him dispose of the gun after the murder was committed. In his statement, Swiger gave detailed directions as to where he and the defendant disposed of the gun.

Swiger also described previous plans that the defendant had considered for murdering the victim. Furthermore, Swiger explained that the murder was executed with the aid of one of the defendant's close associates who called Swiger and informed him, minutes before the murder occurred, when he would have the opportunity to shoot the victim.

Swiger described the actual shooting with specificity. He told of receiving a phone call from Ivey informing him that the victim was about to leave on an errand. He explained that he drove to the defendant's house, parked his car in the alley behind the house, and shot the victim from a position near the back gate. He described firing his gun at the victim as he walked out of the defendant's house toward the defendant's truck. Swiger stated that two shots struck the victim who immediately fell to the ground. From all of this detailed description, there can be no doubt that Swiger was the shooter. Similarly, Swiger displayed a depth of knowledge about the relationship between the defendant and the victim that gives credibility to his claim that the defendant planned the crime.

In our analysis, we must also consider whether the party making the confession had a motive, other than to shift the blame, for inculpating the defendant. *See* Gomez, 191 F.3d at 1222; *Earnest*, 87 F.3d at 1134. Swiger's statement provides us with no reason to believe that there was any animosity between Swiger and the defendant. In the statement, Swiger says that the defendant was one of the first people he met when he moved to Colorado and that he regularly socialized with the defendant. After the murder, the defendant even sent Swiger

some money to help him rent a house. We also observe that Swiger's statement contained no hint that any animosity existed between Swiger and the victim prior to Swiger's confession.
We recognize that in his statement Swiger may have attempted to minimize his girlfriend's involvement in the murder. Swiger's assertion that he sent his girlfriend to a liquor store while he performed the murder conflicted with the fact that a licensed liquor store would have been closed on Sunday, the day that the murder occurred. We do not ***318**

find, however, that this interest was served in any way by inculpating the defendant and thus this motivation raises no serious concerns regarding the trustworthiness of the part of Swiger's statement that inculpates the defendant. [FN11] More importantly, Swiger stated that he knew about the 1992 New Year's Eve kidnapping and violent assault carried out by the defendant and his associates against the victim. Therefore, he was well aware that he was inculpating someone who, along with his associates, was very dangerous and would retaliate if crossed. Thus, Swiger knew that his statement could very well put himself and his family in danger, providing Swiger with a strong incentive to avoid inculpating the defendant. That Swiger acted in the face of such knowledge supports a finding of trustworthiness regarding his statement.

FN11. Swiger received no promises of preferential treatment for his girlfriend from the investigating

officers, only assurances that if "[Swiger's girlfriend] had nothing to do with this ... then we're not gonna do anything to her."

Finally, although the record shows that Swiger was very emotional during his confession, there is no evidence that he was mentally or physically unstable. Thus, from our evaluation of Swiger's statement and the circumstances surrounding the making of the statement, we find that it was supported by guarantees of trustworthiness. Most importantly, we find that the statement was genuinely self-inculpatory and was not designed to shift the blame to the defendant or to curry favor with law enforcement officials.

IV.

In summary, we hold that defendant's rights under the Confrontation Clause were not violated when the trial court admitted Swiger's confession into evidence. We therefore affirm the court of appeals' judgment upholding the defendant's convictions.

Justice BENDER concurs in part and dissents in part, and Justice MARTINEZ joins in the concurrence and dissent.

Justice BENDER concurring in part and dissenting in part.

I agree with the analysis of the majority in Part II, section A, of the opinion holding that a statement against penal interest is not a firmly rooted

exception to the hearsay rule. However, I respectfully dissent from the majority's Part II, section B which holds that the accomplice's statement in this case contains sufficient guarantees of trustworthiness to rebut the presumption that such statements are inherently unreliable. In my view, the accomplice's statement possesses simultaneous indicators of both unreliability and reliability and thereby fails to rebut the heavy presumption of unreliability. As such, the trial court's admission of the accomplice statement violated the Confrontation Clause and, as applied to this case, constitutes constitutional error that is not harmless beyond a reasonable doubt.

This accomplice statement was produced by the government while the declarant was in custody. The circumstances surrounding the taking of the accomplice's statement and the statement itself indicate that cross-examination of the accomplice would at the very least have cast some doubt as to the accomplice's reliability and provided the jury with the accused's perspective when it assessed what weight to give this statement. The statement here suffers from the identical constitutional vices that the United States Supreme Court unanimously condemned in *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999). In the words of the *Lilly* plurality, accomplice statements implicate the core concerns of the old *ex parte* affidavit practice and thus lack inherent reliability:

[T]he historical underpinnings of the Confrontation Clause and the sweep of our prior confrontation cases offer one cogent reminder: It is highly unlikely that the presumptive unreliability that attaches to

accomplices' confessions that shift or spread blame can be effectively rebutted when the statements are given under conditions that implicate the core concerns of the old *ex parte* affidavit practice--that is, when the government is involved in the statements' production, and when the ***319**

statements describe past events and have not been subjected to adversarial testing. *Lilly*, 527 U.S. at 137, 119 S.Ct. 1887; see also John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 Geo. Wash. L.Rev. 191, 228 (1999) ("the 'core' historical purpose of the Confrontation Clause: preventing the inquisitorial practice of trial by affidavit or by *ex parte* examination").

I. Factual Background

Although I agree with a good deal of the majority's statement of the facts, critical facts necessary to determine whether the accomplice's statement is inherently reliable are omitted from its discussion. Thus, I review these facts to place my dissent in perspective.

The victim was killed in February of 1993 as a result of two gunshot wounds. His body was found in the front yard of the defendant ("Crazy Dave"). Several days after the killing, the police questioned the accomplice, John Swiger (whose nickname was "Dreamer") along with his girlfriend, Bonnie Clontz. Questioned separately, both Swiger and Clontz denied involvement in the killing and both said that

at the approximate time of the shooting Bonnie had gone on an errand to the liquor store. At the time, both Clontz and Swiger lived together with their child and other children from Clontz's previous relationships. Swiger later told authorities that he and Clontz told "a fictitious story to police during this interview." Swiger Statement 24, lines 28-29. Almost two years later, the Aurora detective who questioned Swiger immediately after the shooting, along with another Aurora detective, traveled to Carter County, Tennessee to interview Swiger who was in custody on unrelated attempted murder and robbery charges stemming from an incident alleged to have occurred ten or twelve days before the interview. [FN1] The detectives interrogated Swiger for at least two-and-a-half hours, the entirety of which was recorded on an audiotape. [FN2] The only persons present during this questioning were the two Aurora detectives, a Tennessee sheriff (Potter), and Swiger. [FN3] The audiotape was played to the jury and a 73 page transcript of the tape was published. In addition, Swiger gave a short statement written immediately after the taped interview which the prosecution also published to the jury. During deliberations, the jury requested a tape recorder, presumably to use in listening to the tape recording of Swiger's interview. These statements of Swiger's formed the basis of the prosecution's case of murder against the defendant.

FN1. For background on the defendant and the accomplice, Swiger, I note that the defendant was convicted of a number of crimes directed against the victim in this case before the victim's death: first degree kidnapping, conspiracy to convict first degree

kidnapping, second degree assault, criminal conspiracy, menacing, and two counts of crimes of violence. For these crimes the defendant was sentenced to the department of corrections to consecutive terms of eighty years and life. In this murder case, the defendant was convicted of first degree murder, conspiracy to commit first degree murder and solicitation to commit murder. He was sentenced to life imprisonment concurrent with two twenty-four year terms to be served consecutive to the life plus eighty sentence that he received in the prior trial.

Shortly before this trial, Swiger, the accomplice, was acquitted of first degree murder but was convicted of conspiracy to commit first degree murder. Swiger was sentenced to forty-eight years. On appeal, his conviction for conspiracy was affirmed but the court of appeals vacated the sentence and directed the trial court to re-sentence the offender. His sentence is pending appeal. The charges filed against Swiger in Tennessee for kidnapping and attempted murder were not pursued.

FN2. Pursuant to defense motions granted by the trial court, minor portions of the tape and the transcript were deleted.

FN3. The record is unclear as to whether Sheriff Potter was present during the entire interview or whether he joined the interview at some point once it was in progress.

Before actually conducting their interview, the Aurora detectives talked to Clontz and to two other persons, Louis Holm and James Moody. Both Holm and Moody stated that Swiger admitted the Colorado killing. In addition, Holm told the officers that Clontz also had bragged about killing someone in Colorado and that Swiger said he killed several people in Charlotte. Clontz, herself, ***320**

told these detectives that Swiger admitted to her that he killed the victim in this case. The record is unclear as to what details of the murder Clontz gave, but the detectives obtained a tape-recorded statement from her. It is clear, however, that investigators told Swiger, at least four times, that they had spoken to Clontz about Swiger's involvement in the murder. [FN4]

FN4. Swiger Statement 52, lines 2-4; p. 54, lines 12-13; p. 58, lines 1-2; p. 60, line 25.

Near the end of the two-and-a-half hour audiotape, on page 61 of the 73 page transcription, Swiger emotionally admitted killing the victim at the request and direction of the defendant as is fully set forth in the majority opinion. Swiger told investigators that the defendant asked him to commit the murder for $5,000 down and $5,000 after it happened; [FN5] that the defendant gave him the

loaded murder weapon; [FN6] and that the defendant provided him with $300 after the murder when Swiger, Clontz, and a juvenile eyewitness to the shooting, Tina Parks, had traveled together to Tennessee, a few days after the murder. [FN7] Swiger said the defendant planned the murder to prevent the victim from testifying against him since the homicide victim was also the kidnapping and robbery victim in a pending criminal prosecution against the defendant. [FN8]

FN5. Swiger Statement 66, lines 6-8.

FN6. Swiger Statement 66, lines 19-23.

FN7. Swiger Statement 66, lines 1-4.

FN8. *See supra* note 1 (concerning the result of these charges).

For the greatest part of the interview, Swiger claimed that while he helped the defendant to dispose of the gun used in the murder several days after the killing, he, Swiger, had nothing to do with the murder. In this part of the interview, before his admission of his own involvement, Swiger told the police eleven times [FN9] that he had nothing to do with the murder--e.g., "I've never killed anybody, but I'm jus' sure I would remember somethin' like that." Swiger statement 48, lines 7-8. During this part of the questioning Swiger stated that the defendant

told him that "Mike" did the killing, *id.* at 30, lines 4-5. He then described "Mike's" physical characteristics, family life, and residence: "Black guy, great big big guy. Big belly. He lives on an old farm, run, run down shack had a Harley parked out front. Lived with his wife, his two kids, his momma in the house, all of 'em smoked dope. Got a hardwood floor." *Id.*, lines 15-19. Swiger said the defendant told him that "Mike" was the shooter. *See id.* at 29, line 12; p. 30, lines 9, 11.

FN9. *See* Swiger Statement 14, line 19; p. 30, lines 4-5; p. 34, line 17; p. 36, line 4; p. 42, line 22; p. 48, lines 4, 7-8; p. 51, lines 9-13; p. 52, lines 11, 15; p. 53, lines 19-20.

Swiger also told investigators three times, [FN10] both before and after his confession of his involvement as the shooter, that Clontz went to the liquor store at the time that the victim was shot. He repeated this assertion in his written statement saying: "I sent Bonnie, after some liquor and smokes." People's Exhibit No. 1. Investigators later determined that these statements were false because the victim was shot on Sunday, February 28, 1993, at approximately 11:00 p.m., when liquor stores in Colorado were closed.

FN10. *See* Swiger Statement 32, line 6; p. 44, lines 9-10; p. 62, lines 5-8.

With respect to how much he drank on the day of the homicide, Swiger told the Detectives that he was

"quite sure" he had "more than two" (fifths) of whiskey. *Id.* at 50, lines 2-3. Swiger said that the day before he had "done quite a bit" of acid "along with some cocaine." *Id.* at 50, lines 17- 19. Nine times [FN11] on the audiotape Swiger described himself as being drunk on the day of the murder. Additionally, Swiger indicated that in the two weeks prior to the murder he drank at least two bottles of whiskey each day. *Id.*, lines 2-3. During questioning the detectives also suggested to Swiger approximately nine times [FN12] that he was drunk and ***321**

did not really know what he was doing the night of the killing.

FN11. *See* Swiger Statement 32, lines 3-4; p. 33, line 16; p. 43, line 17; p. 44, line 14; p. 46, lines 22-23; p. 49, lines 28-31; p. 50, lines 18-19; p. 63, line 1; p. 70, lines 25-26.

FN12. *See* Swiger Statement 47, lines 4-5, 24-27; p. 48, lines 1-2, 13, 24-25; p. 50, lines 22-23; p. 52, lines 23-28; p. 58, lines 7-8, 22- 25.

Throughout the entire interview, Swiger told the investigators that he acted out of fear because the defendant would kill him and his family if he backed out. By his family, Swiger meant himself, his mother, who lived in the Denver area, and his

girlfriend Clontz and their child. In the early parts of the interview, Swiger stated that he helped the defendant dispose of the gun used to shoot the victim because the defendant threatened his family. In his short written statement, Swiger wrote: "Dave [the defendant] and Cowboy [Cory Ivey's father] told me there was no backing out. That if I didn't. They would kill my family." [FN13] People's Exhibit No. 1.

FN13. Swiger made reference to threats to himself and his family seventeen times in the interview. *See* Swiger Statement 14, lines 15-17; p. 19, lines 16-17 ("[I]t was constantly brought up you know that if I said anything you know that I'd be took care of. The groups would get me."); p. 24, lines 10-13, 28; p. 30, line 25; p. 34, lines 12-13; p. 37, line 9; p. 52, lines 21, 26-27; p. 53, line 5; p. 54, line 25; p. 57, line 16; p. 59, lines 18-20; p. 61, lines 11, 22-23; p. 63, line 3; p. 65, line 8.

Although the tape reveals no specific promises of leniency concerning charges against Swiger for his involvement in this murder, the two detectives twice promised him that they would keep him safe if he confessed, [FN14] and eight times promised him that they would protect his family. [FN15] One of the detectives midway through the interview suggested to Swiger that he committed the murder because he was drunk, that he was influenced by the defendant, and that his denials were false. [FN16] These explanations and variations of this theme culminated in the following thirty-five line "question" by one of the detectives, shortly before Swiger confessed:

FN14. *See* Swiger Statement 54, lines 1-2 and line 13.

FN15. *See* Swiger Statement 53, lines 6, 18, 24-25; p. 54, line 12, p. 57, line 19, p. 60, line 28, p. 62, line 14; p. 67, line 3; p. 72, line 20.

FN16. *See, e.g.*, Swiger Statement 31, lines 15-21; p. 35, lines 18- 24; p. 36, lines 24-25; p. 42, lines 16-21; p. 49, lines 12-18; p. 50, lines 22-23; p. 51, lines 1-6; p. 52, lines 22-27; p. 58, lines 7-12; pp. 58-59, lines 16-37, 1-13.

And I think what happened is that you drink a lot, I think maybe you drink 'way too much and you drink hard liquor and I think you did your cocaine and you may have done 'way too much acid and Crazy Dave starts talkin' with you and starts fillin' this stuff in your head, what kind of big man you can be ... and I think it got to you and I think you got drinking too much and you probably 'way down deep didn't want to do this because you're not that kind of guy but all of a sudden you're another guy, you're like two people, and this other guy came out, this tough Dreamer, this tough guy, not the family Dreamer, not the guy who loves Bonnie and those three children, but the other Dreamer, the guy that's 'n that Harley with the gun and the national enforcer. And maybe this other guy comes out and goes and commits this murder....
Swiger Statement 58-59.
During the course of Swiger's interview,

investigators indicated to Swiger three times that his alleged co-conspirators might implicate him in the murder: "What's gonna happen, John, the minute your buddy Cory and Crazy Dave and Cowboy, or ex-buddies, I mean if they decide to roll on you, if they haven't already rolled, what's gonna happen then? What kind of a story are you gonna have for us then?" Swiger Statement 57, lines 6-9. [FN17] They additionally stated to Swiger that it would not be fair for Swiger's co-conspirators to "get away with any of this what they made you do." *Id.* at 59, lines 12-13.

FN17. *See also* Swiger Statement 57, lines 14-15 ("what's gonna happen when Cory decides to roll on you?"); p. 59, lines 15-16 ("guess who's gonna be the fall guy").

During the trial, Clontz testified that she went to the liquor store that evening. She also said that the only reason that Swiger gave his confession to the Aurora detectives was that Sheriff Potter had threatened to place her children in a foster home. She also told the jury that she implicated Swiger because of this same threat. However, the prosecution ***322**

impeached this statement with her earlier statement to Potter in which she said that it was Swiger, not Sheriff Potter, who threatened to take her kids away from her. Potter testified that he made no such

threats. Clontz also told the jury that she was an excellent marksman, better than Swiger.

II. Analysis

A. Constitutional Standard

Before turning to a discussion of whether Swiger's statements possess particularized guarantees of trustworthiness, I write to express my disagreement with five central themes that run through the majority's analysis.

First, throughout the opinion the majority stresses that a genuinely self-inculpatory statement of an accomplice is inherently reliable: "[T]he most important determination as to its trustworthiness is whether the statement at issue is genuinely self-inculpatory or whether it shifts the blame from the confessor to the defendant." Maj. op. at 314; see also maj. op. at 318 ("[m]ost importantly, we find that the statement was genuinely self-inculpatory"). [FN18] According to the weight of United States Supreme Court precedent and that from many other jurisdictions, this conclusion is simply an inaccurate statement of law. The self-inculpatory portions of a genuinely self-inculpatory statement do not prove the truth or reliability of the non-self-inculpatory or collateral statements that inculpate other persons. [FN19] *Lilly*, 527 U.S. at 138-139, 119 S.Ct. 1887; *Williamson v. United States*, 512 U.S. 594, 599-600, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994); *Lee v. Illinois*, 476 U.S. 530, 545, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986); *United States v. Castelan*, 219 F.3d 690, 695-96 (7th Cir.2000); *United States v. Gomez*, 191 F.3d 1214, 1221 (10th Cir.1999); *Brooks v. State*, 787 So.2d 765, 775, 2001 Fla. LEXIS 624,

*26-27 (Fla.2001); *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117, 133-134 (2000).

FN18. Although the majority contradicts this proposition when it says that "whether a statement is genuinely self-inculpatory is only one of the factors to be analyzed and is not by itself dispositive," maj. op. at 315, a fair reading of the majority leads me to conclude that the majority relies almost exclusively on the self-inculpatory nature of Swiger's statement to hold that it is inherently reliable. *See* Maj. op. at 318.

FN19. Part A of the majority opinion contains citations to some cases where a genuinely self-inculpatory confession was held not to violate the Confrontation Clause. *See* Maj. op. at 313-14, n. 6. Only three of these cases were decided after *Lilly: United States v. Dolah*, 245 F.3d 98, 104-105 (2d Cir.2001) (refusing to adopt the plurality opinion in *Lilly*, because the Second Circuit has regularly approved of the admission of accomplice statements that are largely non-self-inculpatory); *Gabow v. Commonwealth*, 34 S.W.3d 63 (Ky.2000); *State v. Marshall*, 136 Ohio App.3d 742, 737 N.E.2d 1005 (2000) (recognizing, however, that in *Lilly*, the fact that the accomplice's confession implicated the accomplice did not constitute a particularized guarantee of trustworthiness). Other cases decided since *Lilly*, however, have adopted the principle that the self-inculpatory portions of a declarant's statement do not make the non-self-inculpatory statements more reliable. *See* citations in accompanying text.

Whether an accomplice's statement is self-inculpatory restates the obvious that the statement was against his interest. In other words, to say that a statement is against one's penal interests is sufficient for a hearsay exception analysis but is not sufficient for the more stringent analysis required by the constitution. *Lilly*, 527 U.S. at 138-139, 119 S.Ct. 1887; *United States v. Flores*, 985 F.2d 770, 782 (5th Cir.1993); *State v. Cook*, 135 N.H. 655, 610 A.2d 800, 805 (1992). The fact that a statement shifts the blame or is genuinely self-inculpatory may be an indication that the statement is more reliable than unreliable; however, this factor is not necessarily more important than any other factor used to determine the inherent reliability of an accomplice statement.

As a linchpin to its primary conclusion that a genuinely self-inculpatory confession is inherently reliable, the majority relies on the concurring opinion of Chief Justice Rehnquist in *Lilly:* " 'confessions that *equally* inculpate both the declarant and the defendant' " satisfy the firmly rooted exception to a Confrontation Clause violation. Maj. op. at 315 (quoting *Lilly*, 527 U.S. at 146, 119 S.Ct. 1887 (Rehnquist, C.J., concurring)). *But See, Lilly*, 527 U.S. at 148, 119 S.Ct. 1887 (Rehnquist, C.J., concurring) (failing to reach the ***323**

issue of particularized guarantees of trustworthiness).

The majority, however, fails to acknowledge that a six person majority of the Court expressly rejected this view in *Williamson* by concluding that simply because the accomplice makes "a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts." *Williamson*, 512 U.S. at 599, 114 S.Ct. 2431. In fact, the six person Court concluded that the proximity of self-inculpatory statements to other, non-self-inculpatory statements does not reveal the truth of the statement because "[o]ne of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature." *Id.* at 599-600, 114 S.Ct. 2431.

Even if I were to agree that the proximity of self-inculpatory statements to non-self-inculpatory statements indicated the inherent reliability of a statement as a whole, my review of Swiger's statements leads me to challenge the majority's conclusion that "Swiger's statements inculpating the defendant are closely intertwined with the self-inculpatory portions of his confession." Maj. op. at 315. Rather, the details of the defendant's involvement in the murder were given to officers primarily while Swiger denied his own involvement. *See* Swiger Statement 13-16 (describing defendant's request that Swiger kill the victim and Swiger's refusal to do so), pp. 18-22 (describing the defendant's efforts to dispose of the murder weapon). Thus I conclude that the bulk of the non-self-inculpatory portions of Swiger's statement do not intertwine with the self-inculpatory parts.

Secondly, I fault the majority for its nominal

acknowledgment of the heavy presumption of unreliability that attaches to an accomplice's statement. The majority buries the cases discussing this presumption in footnote 6, maj. op. at 313-14, and mentions this presumption only as part of its discussion of whether a statement against penal interest is a firmly rooted hearsay exception in section II, Part A. The majority fails to discuss or to apply this presumption in section II, Part B of its opinion when determining whether Swiger's statement is inherently reliable.

The basis for the presumption of unreliability that attaches to an accomplice's statement has been stated repeatedly by the United States Supreme Court and echoed by other courts: *accomplice confessions that incriminate a codefendant are inherently unreliable, particularly if made while the accomplice is in custody,* because such statements "may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another." *Lee*, 476 U.S. at 545, 106 S.Ct. 2056. [FN20]

FN20. *See also Lilly*, 527 U.S. at 133, 119 S.Ct. 1887; *Bruton v. United States*, 391 U.S. 123, 136, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (concluding that accomplice statements are "inevitably suspect" and that "[t]he unreliability of such evidence is intolerably compounded when the alleged accomplice ... cannot be tested by cross-examination"); *Douglas v. Alabama*, 380 U.S. 415, 419, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); *Flores*, 985 F.2d at 780; *Wilson v. State*, 334 Md. 313, 639 A.2d 125, 137 (1994).

An "accomplice often has a considerable interest in 'confessing and betraying his cocriminals' " once the "jig is up" and he has become an antagonist of his codefendants. *Lilly*, 527 U.S. at 131, 119 S.Ct. 1887 (quoting 5 John Henry Wigmore, *Evidence* § 1477, at 358, n. 1 (1974)); *Lee*, 476 U.S. at 545, 106 S.Ct. 2056; *Commonwealth v. Young*, 561 Pa. 34, 748 A.2d 166, 193 (1999). Thus, because a codefendant has a strong motivation to implicate the defendant, either to benefit or exonerate himself, the use of accomplice statements untested by cross-examination constitutes exactly the kind of threat to a fair trial against which the Confrontation Clause was directed. *See Lee*, 476 U.S. at 541, 106 S.Ct. 2056; *Bruton*, 391 U.S. at 136, 88 S.Ct. 1620.

Third, while the majority opinion acknowledges the prohibition against bootstrapping, that an accomplice's statement must "possess 'indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial,' " maj. op. at 314 (quoting *Idaho v. Wright*, 497 U.S. 805, 822, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990)), the majority violates this prohibition when it concludes: "Examining the record, we find that Swiger ***324**

provided many details concerning the murder and the defendant's participation that could be independently confirmed," maj. op. at 317. The use of corroborating evidence of an accomplice's statement to justify admissibility contravenes established

precedent. *Wright*, 497 U.S. at 822, 110 S.Ct. 3139; *accord Lilly*, 527 U.S. at 137-38, 119 S.Ct. 1887. Further, it taints the majority's analysis, causing the majority to misperceive whether the accomplice's statement possesses particularized guarantees of trustworthiness as required by the Confrontation Clause.

Fourth, the majority also fails to acknowledge the powerful, controlling precedent of the Supreme Court case *Lilly v. Virginia*. *Lilly* is generally cited with respect to its plurality-of-four decision (Justices Stevens, Breyer, Ginsburg, Souter), which concludes that the admission of the accomplice statement in that case violates the Confrontation Clause for failure of particularized guarantees of trustworthiness sufficient to overcome the presumption of unreliability. Two Justices, Scalia and Thomas, wrote separately to say that in their view all custodial statements made to law enforcement by an accomplice are by their very nature inherently unreliable and admission under any circumstances violates the Confrontation Clause. *See Lilly*, 527 U.S. at 143, 119 S.Ct. 1887 (Scalia, J., concurring); *id.* at 143-144, 119 S.Ct. 1887 (Thomas, J., concurring). Three other Justices, Rehnquist, Kennedy, and O'Connor, agreed that the accomplice's custodial statement in *Lilly* inculpating the defendant lacked sufficient indicia of reliability to satisfy the Confrontation Clause. *Id.* at 148, 119 S.Ct. 1887 (Rehnquist, C.J., concurring). Hence, nine Justices believed that Lilly's Sixth Amendment rights were violated, four Justices held that the accomplice's statement lacked the required particularized guarantees of trustworthiness

necessary to pass constitutional scrutiny, two supported a blanket prohibition of government produced confessions, and three believed that a determination of particularized guarantees of trustworthiness should be left for the state court to decide. [FN21]

FN21. I note that at least one commentator agrees with my conclusion:

[T]he Supreme Court [in *Lilly*] indicated, more or less explicitly, that the admission of custodial statements to law enforcement personnel against penal interest ... whether or not constituting a confession, that incriminate another person should ordinarily be held to have violated the confrontation clause when admitted against such another person in a criminal case.
30B Michael H. Graham, *Federal Practice and Procedure* § 7075 at 667- 668(Interim ed.2000); *accord* *Castelan*, 219 F.3d at 695; *Sheets*, 618 N.W.2d at 132.

Considering the impact of the plurality decision and each concurrence, I conclude that the presumption of unreliability that attaches to an accomplice's statement obtained while in custody is rebuttable only in very limited circumstances. In other words, the presumption of unreliability is a "heavy" presumption. *See* *Gomez*, 191 F.3d at 1222. In my view, the majority errs by not reaching a similar conclusion.
Fifth, and finally, while appropriately relying on the Tenth Circuit case of *United States v. Gomez*, for

factors that may indicate inherent reliability of an accomplice's confession, the majority fails to recognize the significant conclusion in *Gomez* which questions whether out-of-court statements that are strongly against a declarant's penal interest but which inculpate a third party *may ever* possess sufficient inherent reliability to satisfy the constitutional mandate after *Lilly*. *Gomez*, 191 F.3d at 1223 ("[A]fter ... *Lilly*, it is no longer clear whether considering the degree to which a statement is against penal interest is even permissible."). Indeed, in *Gomez*, the Tenth Circuit notes that none of their earlier cases support a finding of reliability of an accomplice statement that is self-inculpatory where there are "simultaneously strong indicators of unreliability." *Gomez*, 191 F.3d at 1223.

B. Application of Constitutional Principles

Because I find simultaneous factors of both unreliability and reliability in Swiger's statement, I turn to a discussion of the majority's application of the constitutional principles to Swiger's statement which I find questionable.

The majority distinguishes this case from *Lilly* by saying that although "the accomplice ***325**

[in *Lilly*] confessed to being involved in a crime spree with his co-defendants, which included robberies and a murder, [he] denied any involvement in the murder, the most serious crime committed." Maj. op at 315, n. 7; *see also* maj. op. at 316. While it is accurate that Lilly's brother and co-defendant, Mark, stated that he "didn't have nothing to do with the

shooting," 527 U.S. at 121, 119 S.Ct. 1887, Mark did admit being present when the victim was shot, and by this admission he potentially subjected himself to murder charges based either on a felony murder or complicity theory. By emphasizing that Mark Lilly denied that he was the shooter while Swiger admitted to this role, the majority fails to acknowledge that Swiger, as did Mark Lilly, attempted to shift the blame for the murder by naming the defendant as the mastermind of the crime. [FN22] *See Lilly*, 527 U.S. at 120-21, 119 S.Ct. 1887. Implicating the defendant as the instigator and mastermind of the murder plan, as Swiger did, is a factor that weighs against the inherent reliability of the statement. *Sheets*, 618 N.W.2d at 133 ("A circumstance in which a declarant admits his or her presence and participation in a crime, but indicates that another was the 'mastermind' or primary actor, is one of the more common fact patterns in which courts hold that a declarant's statements inculpating the defendant may not be admitted at trial.").

FN22. Swiger implicates the defendant specifically as the person who offered him and paid him money to murder the victim. *See* Swiger Statement 12, line 31; p. 52, lines 18-19; p. 66, lines 1-6; p. 70, lines 8-13. Swiger also inculpates the defendant as the person who gave him the murder weapon, *id.* at 66, line 19, and who disposed of the gun after the murder, *id.* at 19-22; p. 29, line 2; and p. 64, lines 3-7. Before confessing to the murder, Swiger also implicated the defendant as the person who knew that a man named Mike was the murderer. *See id.* at 29, line 12; p. 30, lines 9, 11.

The majority further distinguishes *Lilly* by stating that at the time Swiger made his statement he "was not being detained for his involvement in the victim's murder and did not have the same outside pressures that existed in *Lilly* to make a statement to the investigating officers." Maj. op. at 316. Although Swiger was not in custody for the Colorado murder, he was in custody for the serious crimes of attempted murder and armed robbery that had allegedly occurred ten to twelve days before this interview. That police officers from Colorado, who had talked to Clontz, were in Tennessee to interview Swiger because of his own statements about the killing suggests that Swiger may have known that he was a suspect at the time of his interview. *See* Swiger Statement 71, lines 23-24 ("I'd already got word 'way y'all were comin' here, that y'all had a tape."). In fact, investigators informed Swiger that he was a suspect in the murder. Swiger Statement 41, lines 18-21 ("[W]e look at you ... [a]s a suspect in this crime."). These circumstances do not suggest that Colorado authorities failed to consider Swiger a serious suspect and had no evidence against Swiger as the majority suggests when it says: "[I]t would appear that Swiger successfully escaped detection for the crime by fleeing the State and taking with him the only known eyewitness to the crime." Maj. op. at 316.

The majority concludes that, unlike in *Lilly*, "apart from informing Swiger that witnesses had come forward stating that they had heard Swiger bragging about his involvement in a murder, the police

investigators did not tell Swiger that they had any other evidence linking him to the victim's murder." Maj. op. at 316.

This statement fails to acknowledge that in addition to other witnesses, the interviewing officers told Swiger that they had interviewed his girlfriend, Bonnie Clontz, before talking to him. Officers expressly stated, "[W]e've already talked to Bonnie," Swiger Statement 54, lines 12-13, and "Bonnie's helpin' us," *id.* at 53, lines 6-7. *See also id.* at 52, lines 2-4. When Swiger denied telling Bonnie what happened the night of the murder, one of the officers confronted him: "So Bonnie's lying?" Swiger answered "I don't know 'cause I don't know what Bonnie told you." *Id.* at 58, lines 1- 2. Although Swiger may have been unaware of the exact content of Bonnie's statements, he understood that the police had spoken with her and that her statements contradicted his earlier denials of involvement.

***326**

A factor weighing against inherent reliability occurs when, as in this case, law enforcement officers have already interrogated another witness and thus knew what they were looking for when questioning the accomplice. Similar circumstances to those that occurred here have been found insufficient to rebut the presumption of unreliability of an accomplice confession. *See* Lee, 476 U.S. at 544, 106 S.Ct. 2056 (concluding that accomplice confession was unreliable where "elicited only after [the declarant] was told that [the defendant] had already implicated

him"); *Brooks*, 2001 Fla. LEXIS at *26, 787 So.2d at 775 (concluding accomplice confession was unreliable where the accomplice was confronted with inculpatory evidence); *see also* *Bass v. Commonwealth*, 31 Va.App. 373, 523 S.E.2d 534, 539 (2000) (concluding that factors indicating reliability were that law enforcement lacked knowledge of the declarant's role in the crime confessed and that the accomplice lacked knowledge that he or she had already been implicated in the crime).

Another way in which the majority distinguishes *Lilly* is by noting "the lack of any offers of leniency" in this case whereas in *Lilly*, officers told the defendant's brother "he would be facing life imprisonment" if he did not make a statement. Maj. op. at 316 n. 9. Although it is true that no express offers of leniency were given to Swiger, as in *Lilly*, police officers implied that failure to confess would result in negative consequences to Swiger. Investigators urged Swiger to confess three times, specifically because someone else might "roll" on him. [FN23]

FN23. *See supra* note 17 and accompanying text.

Additionally, the majority states that "Swiger did not inquire as to any possible benefit he would receive for cooperating with the investigating officers and making his confession." Maj. op. at 316. This conclusion misstates the facts. Swiger inquired as to benefits he would receive in exchange for his statement when he asked for protection for himself and his family [FN24] and when he requested leniency for his girlfriend Clontz. [FN25] Officers

responded to both these requests by offering Swiger and his family protection [FN26] and implying an offer of leniency for Clontz. [FN27] These factors weigh against the trustworthiness of his statement. *Castelan*, 219 F.3d at 695-696 (concluding that statements by law enforcement that an accomplice could "help himself" by "cooperating," offers of protection, and inquiries by the defendant asking what could be done to help him even without an express offer of leniency, weigh against a finding of reliability); *Sheets*, 618 N.W.2d at 132. [FN28] In particular, the implied offer of leniency to Clontz suggests unreliability because it gave Swiger a motive to lie about his girlfriend's possible involvement in the crime. Officers promised Swiger that "if Bonnie had nothing to do with this other than lie to me when I first talked to her (pause) then we're not gonna do anything to her." Swiger Statement 61, lines 7-8.

FN24. Swiger Statement 30, lines 1-3.

FN25. Just before confessing to the murder, Swiger asks the police, "Do y'all promise to leave [Clontz] outta this the rest of the way?" Swiger Statement 61, lines 2-3.

FN26. *See supra* notes 14 and 15 and accompanying text.

FN27. *See* Swiger Statement 61, lines 4, 7-8.

FN28. The majority distinguishes *Sheets*, which concluded that an offer of protection included in plea agreement "indicates a strong motive for [the accomplice] to seek to curry favor with authorities" because in that case the defendant feared for his life in prison. *Sheets*, 618 N.W.2d at 132; *see* Maj. op. at 316 n. 10. Even if this were an important factual distinction, it is not present here since Swiger too feared for his life in prison. *See* Swiger Statement 53, lines 26-27 ("If I got in prison up here man I'm a dead man.... I'm dead as soon as I walk in that door."); p. 59, lines 19-22 ("I've done time before. I've seen snitches, you know what this would do to a small man, everybody's gonna be after me.").

The majority states that "the record does not support an assumption that Swiger's confession was hinged on this offer of protection." Maj. op. at 316 n. 10. I disagree. At the end of the interview, Swiger expressly states his belief that his confession earned his family police protection. When asked if he had been offered anything for his statement, Swiger responds, "jus' that, jus' ahh if ***327**

I told the truth, my family'd be protected." *Id.* at 72, lines 18-19.

The majority also minimizes the role that the officers' leading questions played in obtaining Swiger's confession. The majority fails to acknowledge the extensive leading questions, or more accurately, statements that the officers made

to Swiger. *See* Maj. op. at 315. Before Swiger's admission that he shot the victim, officers offered Swiger their version of the course of events leading to the shooting at least nine times. [FN29] A statement given in response to officials' leading questions, such as those stated by officers to Swiger, is a factor that weighs against a finding of inherent reliability. *Lilly*, 527 U.S. at 139, 119 S.Ct. 1887; *Lee*, 476 U.S. at 544, 106 S.Ct. 2056; *Castelan*, 219 F.3d at 695; *United States v. Papajohn*, 212 F.3d 1112, 1119-20 (8th Cir.2000); *Sheets*, 618 N.W.2d at 131.

FN29. *See supra* note 16 and accompanying text.

In contrast to such leading statements produced while the declarant is in custody, the spontaneity of a statement is a factor that weighs in favor of a finding of particularized guarantees of trustworthiness. An outburst in response to a non-leading question presumably indicates that the declarant did not have time to fabricate a version of events, thereby reducing the constitutional need for cross-examination to test the reliability of the statement. *State v. Cook*, 135 N.H. 655, 610 A.2d 800, 806 (1992) ("A declarant's spontaneous statements are likely to be reliable because his reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief." (quotation marks omitted)); *Wilson*, 639 A.2d at 136 (concluding that a statement which was the product of deliberate and particularized police

interrogation could not be a spontaneous explanation of events).

The majority attempts to diminish the impact of the numerous leading questions by officers by noting that Swiger admitted to officers that he "had confessed his involvement in the victim's shooting to acquaintances in Tennessee." Maj. op. at 316. This statement misrepresents what Swiger said and why he said it. Swiger indicated to officers that he bragged about involvement in the murder to gain the respect of other bikers while simultaneously denying to those officers any actual involvement in the murder. *See* Swiger Statement 25, lines 15-16 ("I told 'em I did it, made me somebody. They respected me. They feared me."); p. 28, line 25 (denying involvement). Swiger did not indicate to officers that these boasts were true confessions, and thus these statements do not significantly minimize government influence in the making of Swiger's statement.

In short, the government action played a significant role in producing Swiger's confession to shooting the victim: Swiger was in custody on serious felony charges in Tennessee; he knew that investigators had talked to his girlfriend about his involvement; [FN30] the officers promised safety for himself and his family; [FN31] the officers promised leniency for any possible involvement his girlfriend might have had in the crime; [FN32] the officers threatened that Swiger's co-conspirators might "roll" on him; [FN33] officers intimated that Swiger could receive mental health assistance if he confessed; [FN34] and Swiger was subjected to a host of suggestive questions by one of the interrogating officers. [FN35]

FN30. *See supra* note 4 and accompanying text.

FN31. *See supra* notes 14 and 15 and accompanying text. At the end
of Swiger's confession, he explicitly states that his reason for confessing is that "if I'm gonna say somethin' they might kill a family anyhow, so I had to. At least I know they're safe." Swiger Statement 73, lines 5-7.

FN32. Immediately before Swiger changed from persistent denials to confessing that he killed the victim, Officer Petrucelli assured Swiger that if he confessed then they would not "drag [Bonnie] in on it." Swiger Statement 61, lines 2-4, 7-8.

FN33. *See supra* note 17 and accompanying text. Swiger was told that it would not be fair for his co-conspirators to "get away with any of this what *they made* you do." Swiger Statement 59, lines 12-13 (emphasis added).

FN34. *See* Swiger Statement 58, lines 31, 37 (suggesting that Swiger is "like two people" and "there's a lot of way to help people like that").

FN35. *See supra* note 16 and accompanying text.

The majority further downplays Swiger's underestimation of his role in the killing by concluding that "[t]he only part of Swiger's confession that in any way minimized his culpability was his naked assertion that he could not withdraw from his agreement with the defendant to murder the victim because he believed that, if he did so, the defendant would harm his family." Maj. op. at 315. Again, I disagree.

Swiger told police, before his confession, that he was not involved with the murder but only helped dispose of the gun. *See* Swiger Statement 13-22. Additionally, Swiger repeatedly stated that he was under the influence of drugs and alcohol at the time of the shooting. He told them that he drank more than two-fifths of whiskey that day and that the day before that he had "done quite a bit" of acid "along with some cocaine." Swiger Statement 50, lines 17-19. He said that, in the weeks before the shooting, he drank at least two bottles of whiskey each day. *Id.*, lines 2-3. Investigators suggested to Swiger that his condition "may help him" minimize his culpability if he had "so much drugs and alcohol in [him] that [he was] not aware of what [his] physical actions are doing or maybe someone could talk [him] into doing something." Swiger Statement 48, lines 14-17.

Thus, I conclude that Swiger attempted to minimize his involvement and put himself in the most favorable light to police by (1) telling them that he was drunk during the shooting, (2) repeatedly claiming, before confessing, that he only helped

dispose of the gun, and (3) after confessing, claiming that he did so only because he was afraid that if he did not carry out the murder, the defendant and his cohorts would kill him and his family.

Additionally the majority concludes, "Nothing in the record suggests that Swiger thought his claim of coercion would exonerate him," maj. op. at 315, in part because "Swiger was aware that confessing to killing the victim would lead to severe consequences," maj. op. at 315. Again, I disagree. While it is true that Swiger understood that confessing may result in life imprisonment, the record also contains evidence that Swiger hoped to mitigate this potential sentence.

In my view, Swiger may have viewed his justification for committing the crimes he did, that is, because of threats of violence directed against him and his family, as mitigating his culpability. He told the detectives no less than seventeen times that he feared for his and his family's safety during the course of his statement. [FN36] These claims may represent an unsophisticated attempt to establish the defense of duress--a statutory defense available to a person who engages in unlawful conduct because of the threatened use of force upon him or another person. *See* § 18-1-708, 6 C.R.S. (2000); *People v. Maes*, 41 Colo.App. 75, 77, 583 P.2d 942, 944 (1978). As a matter of Colorado law, this defense is not available to a person in Swiger's situation, that is, a person under investigation for a class one felony. *See* § 18-1-708 (providing the defense of duress to offenses "other than a class one felony"). Nonetheless, I find it reasonable to conclude that Swiger's explanation of why he killed someone he

hardly knew--that he did it to protect himself and his family--would put him in a favorable light with authorities. It placed "blame on his cohorts, [that] may inure to his advantage." *Lilly*, 527 U.S. at 139, 119 S.Ct. 1887. [FN37]

FN36. *See supra* note 13 and accompanying text.

FN37. This is precisely why the Supreme Court has viewed out-of-court accomplice statements with suspicion and has consistently "spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants." *Lee*, 476 U.S. at 541, 106 S.Ct. 2056; *see also Lilly*, 527 U.S. at 133, 119 S.Ct. 1887; *Bruton*, 391 U.S. at 136, 88 S.Ct. 1620; *Douglas*, 380 U.S. at 419, 85 S.Ct. 1074; *see also Flores*, 985 F.2d at 780; *Wilson*, 639 A.2d at 137.

The majority concludes that Swiger's statement is "genuinely self-inculpatory" in part because it was obtained after a Miranda advisement. Maj. op. at 315. I note that *Miranda* warnings do not bear on the reliability of the accomplice's statement. *Lee*, 476 U.S. at 544, 106 S.Ct. 2056 (concluding that a finding that a confession was "voluntary for Fifth Amendment purposes ... does not ***329**

bear on the question of whether the confession was also free from any desire, motive or impulse [the

accomplice] made have had either to mitigate the appearance of his own culpability by spreading the blame or to overstate [the defendant's] involvement"); *accord*, *Lilly*, 527 U.S. at 138, 119 S.Ct. 1887; *Sheets*, 618 N.W.2d at 134. Additionally, although a statement that describes a crime in a level of detail suggests reliability,[FN38] a detailed description could simply be an elaborate lie, and thus should only be one of a number of factors considered as indicia of inherent reliability. *People v. Turcotte-Schaeffer*, 843 P.2d 658, 662 (Colo.1993). For instance, before Swiger confessed to the murder of the victim, he described in detail the appearance, residence, and family of the "real" shooter, Mike:

FN38. See *Earnest v. Dorsey*, 87 F.3d 1123, 1134 (10th Cir.1996) (concluding that the level of detail in a confession suggests reliability); Sheets, 618 N.W.2d at 135 (same); *Brown v. State*, 953 P.2d 1170, 1180 (Wyo.1998)(same).

Officer: You don't know anything else about this Mike?
Swiger: No, sir, I ... Mike in Oklahoma when I was down there.
Officer: White guy, black guy?
Swiger: Black guy, great big big guy. Big belly. He lives on an old farm, run, run down shack had a Harley parked out front. Lived with his wife, his two kids, his momma in the house, all of 'em smoked dope. Got a hardwood floor.
Swiger Statement 30, lines 12-18. Further, at least one state court has held that a high level of detail in

a statement does not overcome the strong presumption of unreliability which attaches to a statement made in police custody where the declarant had a motive to curry favor with authorities. *Sheets*, 618 N.W.2d at 135.

The majority concludes that Swiger's statement is inherently reliable because it "provides us with no reason to believe that there was any animosity between Swiger and the defendant." Maj. op. at 317. Again, I disagree. Swiger said repeatedly that he lived in fear that the defendant and his cohorts would kill him and/or his family if he failed to commit the murder or reported it to authorities. If true, to me this suggests a great deal of animosity between Swiger and the defendant. In addition, Swiger showed signs of antagonism towards the defendant when he agreed with police officers that the defendant should not get away with this murder. Swiger Statement 59, lines 13-14. Antagonism between an accomplice and a defendant indicates the "jig is up" and that the accomplice has an interest in betraying a co-conspirator. *See Lilly*, 527 U.S. at 131, 119 S.Ct. 1887.

Later in its opinion, the majority states that "Swiger knew that his statement could very well put himself and his family in danger, providing [him] with a strong incentive to avoid inculpating the defendant. That Swiger acted in the face of such knowledge supports a finding of trustworthiness." Maj. op. at 318. I suggest that these conclusions are contradictory: that Swiger made incriminatory statements despite fear of harm to his family appears inconsistent with the conclusion that there existed no animosity between Swiger and the

defendant.

Regarding Swiger's repeated lies about Clontz's trip to the liquor store, [FN39] the majority reasons that these fabrications "raise[ ] no serious concerns regarding the trustworthiness of the part of Swiger's statement that inculpates the defendant." Maj. op. at 318. However, the fact that an accomplice lies about the role of a potential accomplice or co-conspirator raises serious concerns about the credibility of his statement inculpating another in the crime. *See State v. Madrigal*, 87 Ohio St.3d 378, 721 N.E.2d 52, 63 (2000) (finding statement contained no elements of trustworthiness where defendant admitted that he had lied). [FN40]

FN39. *See supra* note 10 and accompanying text.

FN40. When asked if he told a "story to the cops that's not true," Swiger replied, "Yes Sir." Swiger Statement 24, lines 27-28.

The majority asserts that Swiger's statement is inherently reliable in part because "although the record shows that Swiger was very emotional during his confession, there is no evidence that he was mentally or physically***330**

unstable." Maj. op. at 318. While the degree of agitation of a codefendant may in some circumstances be indicative of the reliability of his

statement, [FN41] in my view the majority's conclusion is too sweeping. The fact that the declarant was agitated or crying at the time he made his statement might indicate either that his statement is credible or that it is untrustworthy. Without an opportunity to observe Swiger's demeanor when he made this statement from a video recording or at least hear the audio recording of it, I believe it is impossible for us as an appellate court, to conclude whether the declarant's agitation weighed in favor of or against the inherent reliability of his statement.

FN41. *See Lilly*, 527 U.S. at 139, 119 S.Ct. 1887; *Gomez*, 191 F.3d at 1223; *Cook*, 610 A.2d at 805.

Although the self-inculpatory nature of Swiger's statement, his detailed description of the crime and his understanding that his confession could result in a lifetime sentence of imprisonment present indicia of reliability, the statements possess equally, if not stronger, indicia of unreliability. Swiger was in custody for serious crimes at the time he made his statement; he implicated the defendant as the mastermind of the murder; he repeatedly lied about his and Clontz's involvement in the murder; his confession was made in response to leading questions by government authorities who had other evidence of Swiger's guilt and knew what they were looking for; he asked for and received offers of police protection; he asked for and obtained a no prosecution promise for Clontz; and he attempted to minimize his role and shift blame to the defendant by saying he was drunk and participated only

because of fear for his own safety and that of his family.

Six of the Supreme Court Justices have agreed it is highly unlikely an accomplice statement will contain particularized guarantees of trustworthiness sufficient to rebut the heavy presumption against its admissibility in a criminal trial against the defendant. My application of the factors indicating inherent reliability leads me to conclude that Swiger's confession is not one of the rare accomplice statements that rebuts the presumption of unreliability. However, even applying the majority's grudging view of the presumption of unreliability, in other words, not affording the presumption much weight, the simultaneous existence of indicia of unreliability and reliability in Swiger's statement dictate that this presumption is not overcome. *See* *Gomez*, 191 F.3d at 1223 (concluding that where there are simultaneous indicators of both reliability and unreliability, the presumption of unreliability is not rebutted). In my view, the factors indicating reliability are at least counterbalanced by stronger indicia of unreliability. Hence, the admission of this statement in the defendant's trial violated the Confrontation Clause.

C. Cross-Examination

Before considering whether the admission of Swiger's confession was harmless constitutional error, I pause to express my disagreement with the majority's implicit conclusion that cross-examination of Swiger would have been of marginal utility. *See* Maj. op. at 311 ("The Confrontation Clause only permits the admission of hearsay evidence where the declarant's truthfulness is so clear from the

surrounding circumstances that the test of cross-examination would be of marginal utility." (quotation marks omitted))

As one of the leading treatises on evidence puts it: "For two centuries, common law judges and lawyers have regarded the opportunity of cross-examination as an essential safeguard of the accuracy and completeness of testimony." 1 John W. Strong, et al., *McCormick on Evidence* 87-88 (5th ed.1999). The Confrontation Clauses of both the Colorado and federal constitutions have been construed to guarantee the accused's right to cross-examination in criminal proceedings. [FN42] *Mattox v. United States*, 156 U.S. 237, 242-43, 15 S.Ct. 337, 39 L.Ed. 409 (1895); *People v. Bastardo*, 191 Colo. 521, 524, 554 P.2d 297, 300 (1976). The framers of the Constitution sought to prohibit the use by the Government ***331**

of *ex parte* affidavits by providing the accused the right to confront his accusers in order to test their truth-telling capacities. In the words of the United States Supreme Court, the primary purpose of the Confrontation Clause is to

FN42. *See* U.S. Const. amend. VI ("In all criminal prosecutions the accused shall enjoy the right ... to be confronted with the witnesses against him...."); Colo. Const., art. II, § 16 ("In criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face....")

prevent ... *ex parte* affidavits, ... being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.
Mattox, 156 U.S. at 242-43, 15 S.Ct. 337. [FN43]

FN43. *See also* *Maryland v. Craig*, 497 U.S. 836, 845, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990)("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.").

"There are few subjects, perhaps, upon which [the] Court and other courts have been more nearly unanimous than in the expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Lee*, 476 U.S. at 540, 106 S.Ct. 2056 (quoting *Pointer v. Texas*, 380 U.S. 400, 405, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965)). Supreme Court opinions are replete with references to the historical importance of the Confrontation Clause. *See e.g.*, *Lilly*, 527 U.S. at 140-41, 119 S.Ct. 1887 (Breyer, J. concurring)

("The right of an accused to meet his accusers face-to-face is mentioned in, among other things, the *Bible,* Shakespeare, and 16th and 17th century British statutes, cases and treatises."); *Coy v. Iowa,* 487 U.S. 1012, 1017-18, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988) ("The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it."); *California v. Green,* 399 U.S. 149, 157 n. 10, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). [FN44]

FN44. What was true of old is no less true in modern times. President Eisenhower once described face-to-face confrontation as part of the code of his hometown of Abilene, Kansas. In Abilene, he said, it was necessary to "[m]eet anyone face to face with whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry.... In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow."

Coy, 487 U.S. at 1017-18, 108 S.Ct. 2798.

The accused's right to confront and cross-examine adverse government witnesses "contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails." *Lee,* 476 U.S. at 540, 106 S.Ct. 2056. "[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.' " *Coy,* 487 U.S. at 1017, 108

S.Ct. 2798 (quoting *Pointer*, 380 U.S. at 404, 85 S.Ct. 1065). In addition, this right secures a functional right by promoting reliability in criminal trials. The right of confrontation advances the jury's pursuit of truth because it forces the witness to submit to cross-examination, the "*greatest legal engine ever invented for the discovery of truth.*" *Green*, 399 U.S. at 158, 90 S.Ct. 1930 (emphasis added). [FN45]

FN45. For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination, the "truth" of direct examination as a essential portion of the trial. Not even the abuses, the misunderstandings, and the puerilities which are so often found associated with cross-examination have availed to nullify its value. It may be that in more than one sense, it takes the place in our system which torture occupied in the medieval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth.

Larry S. Pozner, Roger J. Dodd, *Cross-Examination: Science and Techniques* 2 (1993) (quoting 5 Wigmore, *supra* § 1367).

When a witness testifies in person and is subject to adversarial testing, then the jury has the opportunity to assess the demeanor of the witness and to assess whether the witness's direct testimony withstood the rigors of cross-examination. "[C]ross-examination [is] designed to show a prototypical

form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which ***332***

jurors ... could appropriately draw inferences relating to the reliability of the witness.' " *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (quoting *Davis v. Alaska*, 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *cf. People v. Dist. Court*, 933 P.2d 22, 25 (Colo.1997)("[D]uring cross-examination, facts may be brought out tending to discredit the witness by showing that his testimony is untrue or biased.")). In this fashion, our system serves the dual masters of fairness and reliable fact-finding.

By cross-examination a party is entitled to attack the credibility of facts which an adverse witness was called to prove:

In criminal cases, the right of cross-examination extends beyond the subjects testified to on direct testimony and includes the right to examine a witness on any facts tending to refute inferences or deductions arising from matters testified to on direct examination.

Commonwealth v. Green, 525 Pa. 424, 581 A.2d 544, 558-59 (1990).

Looking at Swiger's out-of-court statement and his background, I suggest that he represents a classic example of a witness whose truth-telling might be called into serous doubt by cross-examination. [FN46]

FN46. For example, see the devastating cross-examination of a hitman who testified for the People on direct in a homicide prosecution that he had been hired by the defendant. This cross-examination, which effectively undermined the hitman's credibility begins as follows:

Defense Counsel: You consider yourself an honest man Mr. Bernardini?

Mr. Bernardini: I'm a very honest man, with a lot of integrity.

Pozner, *supra* note 45 at 617.

The cross-examination could portray him as a man who led a life of violent crime--he committed unrelated felonies of escape, kidnapping and armed robbery. As part of this criminal life, he lied, he made excuses, and he blamed others so that he could gain some benefit for himself. The defendant's advocate could demonstrate specifically how Swiger's statement to police reflects this lifestyle of deception. [FN47] He lied to police in Aurora about the killing. Two years later, he repeated this lie to the same officer at least fifteen times. Even after admitting his involvement, he continued to lie to police about the involvement of his girlfriend in the killing--that she went to the liquor store on a Sunday evening at the time of the shooting.

FN47. *See* Albert J. Krieger, The Fine Art and Pure Science of Tailor-Made Cross-Examination, 7 BNA CrimPracMan 547 (Oct. 2, 1993) (providing

techniques for cross-examination to insure that all opportunities to erode the opponent's case and enrich one's own case are recognized); Terence MacCarthy, *The Science of Cross Examination* (American Bar Association 1992); Michael E. Tigar, *Examining Witnesses,* Chs. 8-10 (1993); Pozner, supra note 45; Francis L. Wellman, *The Art of Cross Examination* 148 (1969).

Further, questioning might elicit facts to show how Swiger manipulated others to protect himself. For example, when asked by the Aurora Detectives whether he had sex with Tina Sparks, the sixteen-year-old eye-witness to the shooting, who drove to Tennessee with him and Clontz shortly after the shooting, he admitted he did but added "she told us she was seventeen." [FN48] After the taped interview ended, Swiger told one of the Aurora officers that the Tennessee felony charges then pending, and in which a judge found probable cause, were false because he acted in self-defense. In short, Swiger could readily be depicted as leading a life of violent crime in which being truthful was but a hindrance.

FN48. This statement also suggests that Swiger was familiar with Colorado sexual assault laws. *See* § 18-3-402(1)(e), 6 C.R.S. (2000) ("Any actor who *knowingly* inflicts sexual intrusion ... on a victim commits sexual assault if: ... [a]t the time of the commission of the act, the victim is at least *fifteen* years of age but less than *seventeen* years of age and the actor is at least ten years older than the victim

and is not the spouse of the victim." (emphasis added)).

Had Swiger testified in person, his account would have been tested along these lines of inquiry and, undoubtedly others, as well. He would have had to face the defendant. The jury would have had the opportunity to assess his credibility by his demeanor and the way he answered questions. None of this, of course, occurred. Instead the jury heard only Swiger's voice and those of the police officers. There was no representation of the ***333**

accused present during this *ex parte* conversation, which was, of course, unverified.

By stating that Swiger and his statement were vulnerable to effective cross-examination, I do not mean to suggest that Swiger was not in fact telling the truth. When he confessed to the detectives, he may very well have told the truth. Certainly, a deceitful person may be truthful. However, this possibility should not cause us to lose sight of one of the mainstays of our criminal justice system: the jury must not be deprived of judging an accuser's truth-telling capacity and the defendant must not be deprived of his right to subject his accuser to adversarial questioning. We will never know the impact of Swiger's cross-examination because none occurred for the benefit of the defendant and the jury that voted to convict him.

In my view, the cross-examination of Swiger would

not have been of marginal utility. If his accusations were to be treated as evidence, fairness to the defendant and fairness to the jury that convicted him demanded his presence.

III. REVERSIBLE ERROR

Lastly, I address the issue of whether the admission of Swiger's statement was harmless beyond a reasonable doubt. The United States Supreme Court has applied constitutional harmless error analysis to Sixth Amendment confrontation cases. *See Van Arsdall*, 475 U.S. at 684, 106 S.Ct. 1431. Under our case law, the standard for constitutional harmless error is that an appellate court must be confident beyond a reasonable doubt that the error did not contribute to the jury's verdict:

> A constitutional error is harmless when the reviewing court is confident beyond a reasonable doubt that the error did not contribute to the verdict obtained. The inquiry is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to error.

Griego v. People, 19 P.3d 1, 8-9 (Colo.2001) (citations and quotation marks omitted).

The accomplice's confession was central to the prosecution's case. The jury heard the two-and-a-half hour audiotape of the interrogation, and, during deliberations, requested a tape player to assist them in reaching their verdicts.

Thus, I am not confident beyond a reasonable doubt that the error of admitting Swiger's confession did not contribute to the defendant's conviction. I would reverse the defendant's convictions and remand for a

new trial.

I am authorized to state that Justice MARTINEZ joins in this concurrence and dissent.
Colo.,2001.
Stevens v. People
29 P.3d 305

Briefs and Other Related Documents (Back to top)

- 2000 WL 34235561 (Appellate Brief) Reply Brief of Petitioner (Feb. 29, 2000)
- 2000 WL 34235560 (Appellate Brief) People's Answer Brief (Jan. 10, 2000)
- 1999 WL 33743657 (Appellate Brief) Opening Brief of Petitioner (Nov. 24, 1999)

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